READINGS IN RECENT AMERICAN CONSTITUTIONAL HISTORY

1876-1926

JOHNSON AND ROBINSON

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PREFACE

This volume has grown out of the needs of a class in constitutional history in Yale University. Not only are there no adequate treatises dealing with the development of American polity since the Civil War, but the material for such studies is not always accessible even in well-equipped libraries. While there are numerous treatises and collections of source material in such specialized fields as constitutional law, transportation, and corporate regulation, the extraordinary expansion of Federal authority and the less obvious structural changes in both Federal and State Governments are often overlooked. Histories of the period, moreover, stress the give and take of political groups, or the push and pull of economic forces, without tracing the institutional consequences of these contests and conflicts. The editors of this volume, therefore, have brought together selections from various sources which illustrate the most significant phases in the constitutional development of the last fifty years. In general they have been guided by the same considerations that determined the choice of material in an earlier volume of *Readings in American Constitutional History*, 1776–1876, to which indeed this is a sequel. While intended primarily as a case-book for college classes, it is hoped that this volume will prove useful to the lawyer, the holder of public office, and all persons who are interested in problems of American government and citizenship.

The editors take this opportunity to express their appreciation of many helpful suggestions received from James P. Richardson, Esq., Parker Professor of Law and Political Science in Dartmouth College.

ALLEN JOHNSON
WILLIAM A. ROBINSON

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CONTENTS

PART ONE. POLITICAL AND CIVIL RIGHTS UNDER THE FOURTEENTH AMENDMENT

PAGE

CHAPTER I. AMERICAN CITIZENSHIP

1. United States *v.* Wong Kim Ark. 169 United States, 649 . . . 1
2. The Dawes Act. W. W. Willoughby, *The Constitutional Law of the United States*, I, 310 ff. 8

CHAPTER II. PRIVILEGES AND IMMUNITIES OF CITIZENS

3. Minor *v.* Happersett. 21 Wallace, 162 11
4. Strauder *v.* West Virginia. 100 United States, 303 . . 15

CHAPTER III. PRIVILEGES AND IMMUNITIES OF CITIZENS (CONTINUED)

5. The Civil Rights Cases. 109 United States, 3 20

CHAPTER IV. DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

6. Hurtado *v.* People of California. 110 United States, 516 29
7. Yick Wo *v.* Hopkins. 118 United States, 356 35

CHAPTER V. THE FOURTEENTH AMENDMENT AND THE POLICE POWER

8. Munn *v.* Illinois. 94 United States, 113 40
9. The Chicago, Burlington and Quincy Railroad Company *v.* Iowa. 94 United States, 155 47
10. Peik *v.* Chicago and Northwestern Railway Company. 94 United States. 164 47
11. Pembina Mining Co. *v.* Pennsylvania. 125 United States, 181 48
12. Barbier *v.* Connolly. 113 United States, 27 48

PART TWO. THE EXTENSION OF FEDERAL AUTHORITY

CHAPTER VI. THE FEDERAL REGULATION OF COMMERCE

13. Wabash, St. Louis and Pacific Railway Company *v.* Illinois. 118 United States, 557 52

PAGE

14. Summary of Interstate Commerce Act of 1887. *United States Statutes at Large*, XXIV, 379 56

15. The Maximum Freight Rate Case. 167 United States, 479 57

CHAPTER VII. FEDERAL REGULATION OF INTERSTATE RAILROAD RATES

16. The Elkins Amendments to the Interstate Commerce Act. W. Z. Ripley, *Railroads: Rates and Regulation*, 492 ff. 63

17. The Hepburn Act of 1906. Johnson and Van Metre, *Principles of Railroad Transportation*, 513 ff. 65

18. Interstate Commerce Commission *v.* Illinois Central Railroad Company. 215 United States, 452 69

CHAPTER VIII. FEDERAL REGULATION OF INTRASTATE RAILROAD RATES

19. The Mann-Elkins Amendment to the Interstate Commerce Act. Johnson and Van Metre, *Principles of Railroad Transportation*, 521 ff. 76

20. The Minnesota Rate Cases. 230 United States, 352 . 78

21. The Shreveport Rate Case. 234 United States, 342 . . 83

CHAPTER IX. JUDICIAL REVIEW OF RATES

22. Chicago, Milwaukee and St. Paul Railroad Company *v.* Minnesota. 134 United States, 418 90

23. Reagan *v.* Farmers' Loan and Trust Company. 154 United States, 362 94

24. Smyth *v.* Ames. 169 United States, 466 98

CHAPTER X. THE TRANSPORTATION ACT OF 1920

25. Wisconsin Passenger Fares Case. 257 United States, 563 102

26. Dayton-Goose Creek Railway Company *v.* United States. 263 United States, 456 110

CHAPTER XI. FEDERAL REGULATION OF TRUSTS

27. Definition of Trust. Eliot Jones, *The Trust Problem in the United States*, 1 119

28. The Sherman Anti-Trust Act. *United States Statutes at Large*, XXVI, 209 120

29. United States *v.* E. C. Knight Company. 156 United States, 1 122

PAGE

CHAPTER XII. JUDICIAL INTERPRETATION OF ANTI-TRUST ACT

30. United States *v.* Trans-Missouri Freight Association. 166 United States, 290 128

CHAPTER XIII. JUDICIAL INTERPRETATION OF ANTI-TRUST ACT (CONTINUED)

31. Northern Securities Company *v.* United States. 193 United States, 197 140

32. Standard Oil Company *v.* United States. 221 United States, 1 145

CHAPTER XIV. THE SIXTEENTH AMENDMENT

33. Springer *v.* United States. 102 United States, 586 . . 150

34. Pollock *v.* Farmers' Loan and Trust Company. 158 United States, 601 153

35. Amendment XVI. *United States Statutes at Large*, XXXVII, 1785 158

36. Collector *v.* Day. 11 Wallace, 113 158

37. Evans *v.* Gore. 253 United States, 245 159

CHAPTER XV. THE FEDERAL POLICE POWER

38. Champion *v.* Ames. 188 United States, 321 162

39. McCray *v.* United States. 195 United States, 29 . . . 167

CHAPTER XVI. THE FEDERAL POLICE POWER (CONTINUED)

40. United States *v.* Doremus. 249 United States, 86 . . 174

41. Hammer *v.* Dagenhart. 247 United States, 251 . . . 176

42. Bailey *v.* Drexel Furniture Company. 259 United States, 20 182

43. The Child Labor Amendment. *United States Statutes at Large*, XLIII, 670 185

CHAPTER XVII. THE EIGHTEENTH AMENDMENT

44. Leisy *v.* Hardin. 135 United States, 100 186

45. The Wilson Act. *United States Statutes at Large*, XXVI, 313 191

46. Rhodes *v.* Iowa. 170 United States, 412 192

PAGE

47. The Webb-Kenyon Act. *United States Statutes at Large*, XXXVII, 699 195

48. Amendment XVIII. *United States Statutes at Large*, XXXVIII, 2049 196

CHAPTER XVIII. FEDERAL SUBSIDIES TO THE STATES

49. The Growth of the Subsidy System. A. F. Macdonald, *Federal Subsidies to the States*, 2–8 *passim* 197

50. A Warning against Federal Interference. Message of Governor Blaine of Wisconsin, 1921 200

51. The Sheppard-Towner Act. *United States Statutes at Large*, XLII, 224 201

52. A State-Rights Protest against Federal Subsidies. Memorial of Maryland Legislature, 1924 205

53. Federal Aid in Highway Construction. Speech of Governor Neff of Texas, 1922 206

PART THREE. STRUCTURAL AND FUNCTIONAL CHANGES IN GOVERNMENT

CHAPTER XIX. THE PRESIDENCY

54. President Arthur's Message of December 6, 1881. Richardson, *Messages and Papers of the Presidents*, VIII, 65 208

55. The Presidential Succession. Acts of 1792, 1886. *United States Statutes at Large*, I, 239, XXIV, 1 210

56. The Electoral Count Act. *United States Statutes at Large*, XXIV, 373 211

57. James W. Garner on the Presidential Electoral System. *The Independent*, January 27, 1910 215

CHAPTER XX. SUSPENSIONS AND REMOVALS FROM FEDERAL OFFICE

58. An Act Regulating the Tenure of Certain Civil Offices. *United States Statutes at Large*, XIV, 430 219

59. An Act to Amend "An Act Regulating the Tenure of Certain Civil Offices." *United States Statutes at Large*, XVI, 6 220

60. President Cleveland's Message to the Senate, March 1, 1886. Richardson, *Messages and Papers of the Presidents*, VIII, 376–381 *passim* 221

61. Shurtleff *v.* United States. 189 United States, 311 . . 226

PAGE

CHAPTER XXI. APPOINTMENTS TO FEDERAL OFFICE

62. Civil Service Reform. *Senate Reports*, No. 576, 47 Congress, 1 Session, May 15, 1882 229

63. An Act to Regulate and Improve the Civil Service of the United States. *United States Statutes at Large*, XXII, 403 233

64. The Courtesy of the Senate. G. S. Boutwell, *Reminiscences of Sixty Years in Public Affairs*, II, 282 . . . 237

65. Appointments in the Unclassified Service. W. H. Taft, *Four Aspects of Civic Duty*, 98 238

CHAPTER XXII. ADMINISTRATIVE DETERMINATIONS

66. Public Clearing-House *v.* Coyne. 194 United States, 497 241

67. Administrative Decisions in Connection with Immigration. Louis F. Post in *American Political Science Review*, May, 1916 243

68. United States *v.* Ju Toy. 198 United States, 253 . . . 248

CHAPTER XXIII. THE TREATY-MAKING POWER

69. Senator Rayner on President Roosevelt and Santo Domingo. *Congressional Record*, 59 Congress, 2 Session, XLI, 2006 250

70. Treaties and Executive Agreements. John Bassett Moore in *Political Science Quarterly*, September, 1905 . . 252

CHAPTER XXIV. TREATY-MAKING POWER VERSUS POLICE POWER

71. The San Francisco School Controversy. Elihu Root in *American Journal of International Law*, April, 1907 . . . 261

72. Senator Rayner on the Treaty-Making Power. *Congressional Record*, 59 Congress, 2 Session, XLI, 299–302 *passim* 268

73. Report of the Judiciary Committee of the House of Representatives. *House Reports*, No. 4177, 49 Congress, 2 Session, March 3, 1887 270

CHAPTER XXV. THE SEVENTEENTH AMENDMENT

74. Bryce on the Indirect Method of Electing Federal Senators. *The American Commonwealth* (Edition of 1910), I, 100 272

75. Act of 1866 Regulating Senatorial Elections. *United States Statutes at Large*, XIV, 243 273

76. The Consequences of Election by State Legislatures. G. H. Haynes, *The Election of Senators*, 65–70 *passim* . . . 275

PAGE

77. Senatorial Deadlocks. Editorial article in *The Nation*, March 20, 1902 276

78. Speech of Senator Turpie. *Congressional Record*, 55 Congress, 1 Session, XXX, 171 277

79. "Should Senators Be Elected by the People?" Senator George F. Edmunds in *The Forum*, November, 1894 . . 279

80. The Oregon Plan. Allen Johnson in *The Contemporary Review*, April, 1908 281

81. The Seventeenth Amendment. *United States Statutes at Large*, XXXVIII, 2049 283

CHAPTER XXVI. CONGRESS AND ITS METHODS

82. The Power of the Senate. Samuel W. McCall in *The Atlantic Monthly*, October, 1903 285

83. The Senate and Financial Measures. Charles W. Collins, *The National Budget System*, 77–78, 95–98 *passim* . . 289

84. Congress and Its Critics. Hon. Frank W. Mondell in *The American Review of Reviews*, July, 1923 292

CHAPTER XXVII. BUDGETARY REFORM

85. Division of Responsibility in Congress. Charles W. Collins, *The National Budget System*, 88–92 *passim* . . . 296

86. Digest of Budget and Accounting Act. *The Congressional Digest*, November, 1922 297

87. The Budgetary Reforms of 1921. W. F. Willoughby, *The Congressional Digest*, November, 1922 301

88. The Maryland Budget System. Constitution of Maryland, Article III, Section 52 303

CHAPTER XXVIII. GOVERNMENT BY INJUNCTION

89. *In re* Debs. 158 United States, 564 308

90. "Government by Injunction." William H. Dunbar in *The Law Quarterly Review*, October, 1897 314

CHAPTER XXIX. THE INJUNCTION IN LABOR DISPUTES

91. The Use of the Injunction in America. Dissenting Opinion of Mr. Justice Brandeis in Truax *v.* Corrigan. 257 United States, 312 322

92. The Clayton Act. *United States Statutes at Large*, XXXVIII, 730 324

93. Duplex Printing Company *v.* Deering *et al.* 254 United States, 443 325

PAGE

CHAPTER XXX. THE SUPREME COURT AND LABOR LEGISLATION

94. Lochner *v.* New York. 198 United States, 45 . . . 335

CHAPTER XXXI. THE SUPREME COURT AND LABOR LEGISLATION (CONTINUED)

95. Muller *v.* Oregon. 208 United States, 412 346

96. Bunting *v.* Oregon. 243 United States, 426 351

CHAPTER XXXII. THE SUPREME COURT AND LABOR LEGISLATION (CONTINUED)

97. Adkins *et al. v.* Children's Hospital. 261 United States, 525 357

CHAPTER XXXIII. LIMITATIONS UPON STATE POWERS

98. The Limits of State Governmental Power. Walter F. Dodd, *State Government*, 131–132 370

99. *In re* Morgan. 26 Colorado, 415 371

100. Amendment to Colorado Constitution. Article V, Section 25a 373

101. People *v.* Williams. 189 New York, 131 373

102. People *v.* Schweinler Press. 214 New York, 395 . . 376

CHAPTER XXXIV. LIMITATIONS UPON STATE LEGISLATURES

103. The Virginia Constitution. Article IV, Sections 46–64 *passim* 380

104. State *v.* Covington. 29 Ohio State Reports, 102 . . 385

105. People *ex rel.* Carter *v.* Rice. 135 New York, 473 . . 385

106. State *ex rel.* Attorney General *v.* Cunningham. 81 Wisconsin, 440 388

CHAPTER XXXV. THE STATE EXECUTIVE

107. Michigan Constitution of 1908. Article V, Section 36; Article VI, Sections 1–21 392

108. The Nature of the Executive Power. John M. Mathews, *Principles of American State Administration*, 79–80 . . . 396

109. *Ex parte* Holmes. 12 Vermont, 643 397

110. Field *v.* People. 3 Illinois, 79 398

PAGE

CHAPTER XXXVI. THE STATE ADMINISTRATIVE DEPARTMENT

111. The Fourth Department of Government. Frank J. Goodnow, *The Principles of the Administrative Law of the United States*, 130–131 403

112. State Boards and Commissions. F. H. White, "The Growth and Future of State Boards and Commissions," *The Political Science Quarterly*, December, 1903 404

113. Divided Responsibility in Massachusetts. Message of Governor William E. Russell to the Legislature, January 7, 1892 409

114. Divided Responsibility in New York. *Report of Reconstruction Commission*, October 10, 1919, 7–8 412

115. Administrative Reorganization in New York. Constitution of New York. Amendment to Article V and Article VIII, Section 11, November 3, 1925 413

CHAPTER XXXVII. THE LEGAL POSITION OF MUNICIPAL CORPORATIONS

116. Commissioners of Laramie County *v.* Commissioners of Albany County. 92 United States, 307 415

117. The Constitution of Ohio, 1851. Article II, Section 26; Article XIII, Sections 1, 6 417

118. The Classification of Cities in Ohio. John A. Fairlie, *Essays in Municipal Administration*, 96–97 418

119. The Municipal Crisis of 1902 in Ohio. State *ex rel.* Kniseley *et al. v.* Jones *et al.* 66 Ohio State Reports, 453 . 418

120. The Present Constitution of Ohio. Article XVIII . . 422

CHAPTER XXXVIII. THE NEWER FORMS OF CITY GOVERNMENT

121. The Massachusetts Optional Charter Act. *Massachusetts General Acts of* 1915, Chapter 267, 291–315 *passim* 425

PART FOUR. THE EXTENSION OF DEMOCRACY

CHAPTER XXXIX. DIRECT LEGISLATION AND THE RECALL

122. The Initiative and Referendum in Oregon: The Constitutional Provisions. Constitution of Oregon, Article IV, Sections 1, 1a 441

123. The Initiative and Referendum in Oregon: The Law of 1907. *General Laws of Oregon*, 1907. Chapter 226 . . . 442

PAGE

124. Kadderly *et al. v.* City of Portland *et al.* 44 Oregon, 114 447

125. The Initiative and Referendum in Practice. Extracts from Oregon Publicity Pamphlet, 1922 449

126. Recall from Office in Arizona. Constitution of Arizona, Article VIII 453

CHAPTER XL. ELECTORAL AND PRIMARY REFORM

127. Introduction of the Australian Ballot in Massachusetts. *Massachusetts Acts and Resolves*, 1889. Chapter 413, 1110–1123 *passim* 456

128. The Regulation of Primary Elections. C. E. Merriam, *Primary Elections*, 28–31; 133–135 460

129. Nominating Methods. P. O. Ray, *An Introduction to Political Parties*, 140–147 *passim* 463

CHAPTER XLI. WOMAN SUFFRAGE

130. Address before the Committee of Suffrage of the New York Constitutional Convention of 1894 by Mary Putnam-Jacobi. Mary Putnam-Jacobi, *Common-Sense Applied to Woman Suffrage*, 200–211 *passim* 467

131. Speech by Elihu Root before the New York Constitutional Convention. *Revised Record of Constitutional Convention of* 1894, II, 521–524 473

132. Amendment XIX. *United States Statutes at Large*, XLI, 1823 475

PART FIVE. THE GOVERNMENT OF DEPENDENCIES

CHAPTER XLII. THE CONSTITUTION AND INSULAR TERRITORIES

133. Downes *v.* Bidwell. 182 United States, 244 477

CHAPTER XLIII. OTHER INSULAR CASES

134. Hawaii *v.* Mankichi. 190 United States, 197 . . . 491

135. Rassmussen *v.* United States. 197 United States, 516 . 495

136. Balzac *v.* People of Porto Rico. 258 United States, 298 499

INDEX 507

PART ONE. POLITICAL AND CIVIL RIGHTS UNDER THE FOURTEENTH AMENDMENT

CHAPTER I

AMERICAN CITIZENSHIP

By the Fourteenth Amendment the freed negroes had been invested with both National and State citizenship, the former being paramount, and in the Slaughter House Cases decided in 1873 the Supreme Court had declared its "pervading purpose" to be the protection of the negro against unjust discrimination by the State. The applicability of the provisions of the amendment to other races became a problem when Chinese and other Asiatics were debarred from the privilege of naturalization and later from entry into the United States. Were the children of such disqualified persons if "born in the United States" entitled to the rights and privileges of that citizenship from which the parents were debarred?

The status of Indians has been peculiar. They have been considered wards of the nation and while under tribal organization protected by Federal authority from foreign nations and the States. In the matter of citizenship, the fact that in nearly all cases they were "born in the United States" did not necessarily mean that they were citizens. Citizenship was conferred by treaty, by act of Congress, and by naturalization. On June 2, 1924, however, this anomaly was swept away by enactment of Congress, "that all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *provided* that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." As long as tribal property is recognized, some measure of Federal guardianship is likely to continue.

1. *United States* v. *Wong Kim Ark* [1]

Mr. Justice Gray, after stating the facts, delivered the opinion of the court.

The facts of this case, as agreed by the parties, are as follows: Wong Kim Ark was born in 1873, in the city of San Francisco, in the State of California and the United States of America, and was and is a laborer. His father

[1] Supreme Court of the United States. 1898. 169 United States, 649.

and mother were persons of Chinese descent, and subjects of the Emperor of China; they were at the time of his birth domiciled residents of the United States, having previously established and still enjoying a permanent domicile and residence therein at San Francisco; they continued to reside and remain in the United States until 1890, when they departed for China; and during all the time of their residence in the United States they were engaged in business, and were never employed in any diplomatic or official capacity under the Emperor of China. Wong Kim Ark, ever since his birth, has had but one residence, to wit, in California, within the United States, and has there resided, claiming to be a citizen of the United States, and has never lost or changed that residence, or gained or acquired another residence; and neither he, nor his parents acting for him, ever renounced his allegiance to the United States, or did or committed any action or thing to exclude him therefrom. In 1890 (when he must have been about seventeen years of age) he departed for China on a temporary visit and with the intention of returning to the United States, and did return thereto by sea in the same year, and was permitted by the collector of customs to enter the United States, upon the sole ground that he was a native-born citizen of the United States. After such return, he remained in the United States, claiming to be a citizen thereof, until 1894, when he (being about twenty-one years of age, but whether a little above or a little under that age does not appear) again departed for China on a temporary visit and with the intention of returning to the United States; and he did return thereto by sea in August, 1895, and applied to the collector of customs for permission to land; and was denied such permission, upon the sole ground that he was not a citizen of the United States.

It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him.

The question presented by the record is whether a child

born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had, not only to all parts of the act itself, and of any former act of the same lawmaking power, of which the act in question is an amendment; but to also the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." By the original Constitution, every representative in Congress is required to have been "seven years a citizen of the United States," and every senator to have been "nine years a citizen of the United States"; and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President." Art. II, sec. 1. The Fourteenth Article of Amendment, besides declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," also declares that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And the Fifteenth Article of Amend-

ment declares that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude."

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. . . .

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith," or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual —as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their hostile occupation of part of the King's dominions, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King. . . .

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, and the jurisdiction, of the English sovereign; and therefore every child born in England of alien parents was a natural-born

subject, unless the child of an ambassador or other diplomatic agent of a foreign State, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established. . . .

The decision in Elk *v.* Wilkins concerned only members of the Indian tribes within the United States, and had no tendency to deny citizenship to children born in the United States of foreign parents of Caucasian, African or Mongolian descent, not in the diplomatic service of a foreign country.

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words, "All persons born in the United States," by the addition, "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country. . . .

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes

owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. . . .

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States. . . .

The acts of Congress, known as the Chinese Exclusion Acts, the earliest of which was passed some fourteen years after the adoption of the constitutional amendment, cannot control its meaning, or impair its effect, but must be construed and executed in subordination to its provisions. And the right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the Emperor of China, though having acquired a commercial domicile in the United States, has been upheld by this court, for reasons applicable to all aliens alike, and inapplicable to citizens, of whatever race or color. . . .

It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties and decisions upon that subject—always bearing in mind that statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution. . . .

The fact, therefore, that acts of Congress or treaties have not permitted Chinese persons born out of this country to become citizens by naturalization, cannot ex-

clude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, "All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

VII. Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, "the right of expatriation is a natural and inherent right of all people," and "any declaration, instruction, opinion, order or direction of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." Rev. Stat. sec. 1999, re-enacting act of July 27, 1868, c. 249, sec. 1; 15 Stat. 223, 224. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful. But it would be out of place to pursue that inquiry; inasmuch as it is expressly agreed that his residence has always been in the United States, and not elsewhere; that each of his temporary visits to China, the one for some months when he was about seventeen years old, and the other for something like a year about the time of his coming of age, was made with the intention of returning, and was followed by his actual return, to the United States; and "that said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom."

The evident intention, and the necessary effect, of the submission of this case to the decision of the court upon the facts agreed by the parties, were to present for determination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of

his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative.

2. *The Legal Status of Indians* [1]

At various times during past years, Congress has declared as to particular Indian tribes, that their lands should be divided and held in severalty by their respective members, and that, thereupon, such Indians should become citizens of the United States, and pass immediately from the exclusive jurisdiction of the Federal Government to that of the States in which they reside. By the General Land in Severalty Law, known as the "Dawes Act," approved February 8, 1887, the President was given the power to apply this process to practically every Indian reservation in the country. The following are the provisions of this act upon the points under discussion:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: . . .

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the

[1] W. W. Willoughby, *The Constitutional Law of the United States*, I, 310 *ff.* Reprinted by permission of Baker, Voorhis and Company, New York City.

allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. . . .

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory, in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizen whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. . . ."

The peculiarity of these acts is, it will be observed, that it makes citizens of Indians against their will. The action is taken at the discretion of the President and citizenship is the result.

The declaration of 1871, and the acts of 1885 and 1887, and the sustaining of their constitutionality by the Supreme Court, illustrate the legal power of the United States to govern the tribal Indians at will as bodies of individuals completely subject to its legal control, despite the status of quasi-independence that has been accorded them. This absolute power of control has been conspicuously exhibited in more recent legislation which has been enacted in pursuance of a policy decided upon to abolish, as rapidly as possible, the tribal relations and governments, to extinguish the Indian titles to lands, and to incorporate the individual Indians in the general citizen bodies of the States and Territories in which they live.

CHAPTER II

PRIVILEGES AND IMMUNITIES OF CITIZENS

"No State," says the Fourteenth Amendment, "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Since the meaning of the term "privileges or immunities" is not explicitly stated, it is obviously open to various constructions. The Supreme Court, however, pointed out that the amendment was not intended to make a revolutionary change in the theory of the Federal system. A State does not violate the amendment by making laws abridging privileges and immunities which are wholly a matter of State citizenship. On the other hand, a State may not make or enforce any law which deprives a citizen of those rights which he enjoys because of his paramount national citizenship. The reasoning by which the Supreme Court reaches conclusions as to the effect of specific State enactments is illustrated in the following decisions.

3. *Minor v. Happersett* [1]

Mr. Chief Justice Waite delivered the opinion of the court.

The question is presented in this case, whether, since the adoption of the Fourteenth Amendment, a woman, who is a citizen of the United States and of the State of Missouri, is a voter in that State, notwithstanding the provision of the Constitution and laws of the State, which confine the right of suffrage to men alone. . . .

Sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The Fourteenth Amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The amendment prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of

[1] Supreme Court of the United States, 1875. 21 Wallace, 162.

the United States; but it did not confer citizenship on her. That she had before its adoption.

If the right of suffrage is one of the necessary privileges of a citizen of the United States, then the Constitution and laws of Missouri confining it to men are in violation of the Constitution of the United States, as amended, and consequently void. The direct question is, therefore, presented whether all citizens are necessarily voters.

The Constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. In this case we need not determine what they are, but only whether suffrage is necessarily one of them.

It certainly is nowhere made so in express terms. The United States has no voters in the States of its own creation. The elective officers of the United States are all elected directly or indirectly by State voters. The members of the House of Representatives are to be chosen by the people of the States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the State legislature. . . .

The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the State laws, and not directly upon the citizen.

It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted. This makes it proper to inquire whether suffrage was co-extensive with the citizenship of the States at the time of its adoption. If it was, then it may with force be argued that suffrage was one of the rights which belonged to citizenship, and in the enjoyment of which every citizen must be protected. But if it was not, the contrary may with propriety be assumed.

When the Federal Constitution was adopted, all the several States, with the exception of Rhode Island and Connecticut had constitutions of their own. These two continued to act under their charters from the Crown. Upon an examination of those constitutions we find that in no State were all citizens permitted to vote. Each State determined for itself who should have that power. . . .

In this condition of the law in respect to suffrage in the several States, it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By article 4, section 2, it is provided that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus be voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the amendment we have been considering (the fourteenth), "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for

participation in the rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." Why this, if it was not in the power of the legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, "persons." They are counted in the enumeration upon which the apportionment is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated, if suffrage was the absolute right of all citizens.

And still again, after the adoption of the Fourteenth Amendment, it was deemed necessary to adopt a fifteenth, as follows: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." The Fourteenth Amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffrage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, etc.? Nothing is more evident than that the greater must include the less, and if all were already protected, why go through with the form of amending the Constitution to protect a part? . . .

Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice long continued can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be. . . .

Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, *we affirm the judgment of the court below.*

4. *Strauder* v. *West Virginia* [1]

Mr. Justice Strong delivered the opinion of the court.

The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced. The record was then removed to the Supreme Court of the State, and there the judgment of the Circuit Court was affirmed. The present case is a writ of error to that court, and it is now, in substance, averred that at the trial in the State court the defendant (now plaintiff in error) was denied rights to which he was entitled under the Constitution and laws of the United States. . . .

The law of the State to which reference was made in the petition for removal and in the several motions was enacted on the 12th of March, 1873 (Acts of 1872–73, p. 102), and it is as follows: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors, except as herein provided." The persons excepted are State officials.

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impanelled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been

[1] Supreme Court of the United States, 1879. 100 United States, 303.

preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury. . . . [Sect. 1 of the Fourteenth Amendment is here recited.]

This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the Slaughter-House Cases, 16 Wall. 36, cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general gov-

ernment, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. . . .

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted ex-

cluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such a prejudice and its likelihood to con-

tinue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment might have been unnecessary, and it might have been left to the States to extend equality of protection. . . .

We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. . . .

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution. . . .

CHAPTER III

PRIVILEGES AND IMMUNITIES OF CITIZENS

(CONTINUED)

One aspect of the centralizing tendencies which followed the Civil War was a wide-spread belief that the strong arm of Federal authority should protect the negro from wrongful discrimination by his fellow citizens. The Civil Rights Cases arose under the Second Civil Rights Act of March 1, 1875, entitled, "An act to protect all citizens in their civil and legal rights." It declared all persons entitled to the full and equal enjoyment of inns, public conveyances, and places of public amusement, and it provided penalties for any person who should deny the full and equal enjoyment of these accommodations and privileges to any citizen "except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude." The cases brought to the Supreme Court by writ of error were instituted by persons of color who had been denied accommodations in inns and theatres, and in one case in a women's car on a certain railroad. The interpretation of the Fourteenth Amendment in these cases was distinctly restrictive. Congress had not been given power to legislate on matters within the domain of State legislation. If Congress could provide for the punishment of the hotel proprietor who refused to rent a room to a negro, there was practically no limit to possible applications of Federal power. The amendment was intended to safeguard the citizen against violations of his privileges and immunities by the State, or under State authority, but not against violations by individuals. The decision, while restrictive in character, admits nevertheless that State discrimination against negroes is not the only possible violation of the amendment. Any kind of "class legislation" would inevitably abridge the privileges and immunities of citizens of the United States and deny the equal protection of the laws. The constitutionality of many and varied State enactments may therefore be contested on the ground that they involve a violation of the Fourteenth Amendment.

5. *The Civil Rights Cases* [1]

Mr. Justice Bradley delivered the opinion of the court. . . .

Has Congress constitutional power to make such a law? Of course, no one will contend that the power to pass it was contained in the Constitution before the adop-

[1] Supreme Court of the United States, 1883. 109 United States, 3.

tion of the last three amendments. The power is sought, first, in the Fourteenth Amendment. . . .

The first section . . . declares that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges, and by

power given to Congress to legislate for the purpose of carrying such prohibition into effect: and such legislation must necessarily be predicated upon such supposed State laws or State proceedings, and be directed to the correction of their operation and effect. . . .

And so in the present case, until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity: for the prohibitions of the amendment are against State laws and acts done under State authority. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are pro-

hibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking. It is not necesary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character.

An inspection of the law shows that it makes no reference whatever to any supposed or apprehended violation of the Fourteenth Amendment on the part of the States. It is not predicated on any such view. It proceeds *ex directo* to declare that certain acts committed by individuals shall be deemed offenses, and shall be prosecuted and punished by proceedings in the courts of the United States. It does not profess to be corrective of any constitutional wrong committed by the States; it does not make its operation to depend upon any such wrong committed. It applies equally to cases arising in States which have the justest laws respecting the personal rights of citizens, and whose authorities are ever ready to enforce such laws, as to those which arise in States that may have violated the prohibition of the amendment. In other words, it steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other, and imposes sanctions for the enforcement of those rules, without referring in any manner to any supposed action of the State or its authorities.

If this legislation is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property? If it is supposable that the States may deprive persons of life, liberty, and property without due process of law (and the amendment itself does suppose this), why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights, in every possible case, as well as to prescribe equal privileges in inns, public conveyances, and theatres? The truth is, that the implication of a power to legislate

in this manner is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. It is repugnant to the Tenth Amendment of the Constitution, which declares that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people. . . .

In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy and sell, to sue in the courts, or to be a witness or a juror; he may, by force or fraud, interfere with the enjoyment of the right in a particular case; he may commit an assault against the person, or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow citizen; but, unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment; and amenable therefore to the laws of the State where the wrongful acts are committed. Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual

offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration. . . .

But the power of Congress to adopt direct and primary, as distinguished from corrective legislation, on the subject in hand, is sought, in the second place, from the Thirteenth Amendment, which abolishes slavery. This amendment declares "that neither slavery, nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"; and it gives Congress power to enforce the amendment by appropriate legislation. . . .

It is true that slavery cannot exist without law, any more than property in lands and goods can exist without law; and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States: and upon this assumption it is claimed, that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances, and places of amusement; the argument being, that the denial of such equal accommodations and privileges is, in itself, a subjection to a species of servitude within the meaning of the amendment. Conceding the major proposition to be true, that Congress has a right to en-

act all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theatre, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment. . . .

We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery: the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. Under the Thirteenth Amendment, it has only to do with slavery and its incidents. Under the Fourteenth Amendment, it has power to counteract and render nugatory all State laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

The only question under the present head, therefore, is, whether the refusal to any persons of the accommodations of an inn, or a public conveyance, or a place of public amusement, by an individual, and without any sanction or support from any State law or regulation, does in-

flict upon such persons any manner of servitude, or form of slavery, as those terms are understood in this country? Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the *posse comitatus* without regular trial; or denying to any person, or class of persons, the right to pursue any peaceful avocations allowed to others. What is called class legislation would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment, but would not necessarily be so to the Thirteenth, when not involving the idea of any subjection of one man to another. The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery. The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.

Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the States by the Fourteenth Amendment are forbidden to deny to any person? And is the Constitution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do

with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment. It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodations to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it. . . .

On the whole, we are of opinion, that no countenance of authority for the passage of the law in question can be found in either the Thirteenth or Fourteenth Amendments of the Constitution; and no other ground of authority for its passage being suggested, it must necessarily be declared void, at least so far as its operation in the several States is concerned. . . .

CHAPTER IV

DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

In addition to the restrictions already discussed, the Fourteenth Amendment forbade any State to "deprive any person of life, liberty, or property, without due process of law," and to "deny to any person within its jurisdiction the equal protection of the laws." A provision of the California Constitution of 1879 provided for the prosecution of offenders by information after examination and commitment by a magistrate, or by indictment with or without such examination and commitment as might be prescribed by law. Prosecution upon indictment by a grand jury was the prevailing method throughout the country. One Hurtado, upon information filed by the District Attorney of Sacramento, had been tried, convicted, and sentenced to be hanged. Had the State deprived him of his liberty, and was it about to deprive him of his life, without due process of law?

A legislative body is unlikely to make an open attack on the rights of any person, group of persons, or special interest within its jurisdiction. It may attempt to attain such an end in the guise of a general regulation, by the use of the taxing power, or by some other devious method. A city ordinance of San Francisco declared it unlawful for any person to establish, maintain, or carry on a laundry within the city limits "without having first obtained the consent of the Board of Supervisors, except the same be located in a building constructed either of brick or stone." In 1886 Yick Wo, a native of China, was arrested and fined for violation of this ordinance. In default of paying the fine he was imprisoned. He thereupon invoked the protection of the Fourteenth Amendment on the ground that the ordinance under which he had been punished was unfair discrimination against Chinese laundrymen.

6. *Hurtado* v. *People of California* [1]

Mr. Justice Matthews delivered the opinion of the court.

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words: "Nor shall any State deprive any

[1] Supreme Court of the United States, 1884. 110 United States, 516.

person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law. . . .

On the other hand, it is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

This view is certainly supported by the authority of the great name of Chief Justice Shaw and of the court in which he presided, which, in Jones *v.* Robbins, 8 Gray, 329, decided that the 12th article of the Bill of Rights of Massachusetts, a transcript of Magna Charta in this re-

spect, made an indictment or presentment of a grand jury essential to the validity of a conviction in cases of prosecutions for felonies. In delivering the opinion of the court in that case, Merrick, J., alone dissenting, the Chief Justice said:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." . . . "It having been stated," he continued, "by Lord Coke, that by the 'law of the land' was intended a due course of proceeding according to the established rules and practice of the courts of common law, it may, perhaps, be suggested that this might include other modes of proceeding sanctioned by the common law, the most familiar of which are, by informations of various kinds, by the officers of the crown in the name of the King. But, in reply to this, it may be said that Lord Coke himself explains his own meaning by saying 'the law of the land,' as expressed in Magna Charta, was intended due process of law, that is, by indictment or presentment of good and lawful men. And further, it is stated, on the authority of Blackstone, that informations of every kind are confined by the constitutional law to misdemeanors only. 4 Bl. Com. 310." . . .

This passage from Coke seems to be the chief foundation of the opinion for which it is cited; but a critical examination and comparison of the text and context will show that it has been misunderstood; that it was not intended to assert that an indictment or presentment of a grand jury was essential to the idea of due process of law in the prosecution and punishment of crimes, but was only mentioned as an example and illustration of due process of law as it actually existed in cases in which it was customarily used. . . .

This view of the meaning of Lord Coke is the one taken

by Merrick, J., in his dissenting opinion in Jones *v.* Robbins, 8 Gray, 329, who states his conclusions in these words:

"It is the forensic trial, under a broad and general law, operating equally upon every member of our community, which the words, 'by the law of the land,' in Magna Charta, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and his property, by preventing the unlawful arrest of his person or any unlawful interference with his estate." . . .

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property. . . .

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that: "No person shall be held to answer for a capital or otherwise

infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself." It then immediately adds: "Nor be deprived of life, liberty, or property, without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure.

"The Fourteenth Amendment," as was said by Mr. Justice Bradley in Missouri *v.* Lewis, 101 U. S. 22–31,

"does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding."

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. . . .

For these reasons, finding no error therein, the judgment of the Supreme Court of California is *Affirmed.*

7. *Yick Wo* v. *Hopkins* [1]

Mr. Justice Matthews delivered the opinion of the court. . . .

We are consequently constrained, at the outset, to differ from the Supreme Court of California upon the real meaning of the ordinances in question. That court considered these ordinances as vesting in the board of supervisors a not unusual discretion in granting or withholding their assent to the use of wooden buildings as laundries, to be exercised in reference to the circumstances of each case, with a view to the protection of the public against the dangers of fire. We are not able to concur in that interpretation of the power conferred upon the supervisors. There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint. . . .

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are

[1] Supreme Court of the United States, 1886. 118 United States, 356.

aliens and subjects of the Emperor of China. By the third article of the treaty between this government and that of China, concluded November 17, 1880, 22 Stat. 827, it is stipulated: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its powers to devise measures for their protection, and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes, that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court. . . .

In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases

present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . .

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of

the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. . . .

CHAPTER V

THE FOURTEENTH AMENDMENT AND THE POLICE POWER

In the decade following the close of the Civil War there developed a strong demand for the regulation of railroads, elevators, warehouses, and other agencies concerned in the marketing of agricultural products, especially grain. Great areas of fertile land had been brought under cultivation, more grain was produced than the markets of the world could easily absorb, and there was great distress among farmers. The railroad and allied corporations were regarded with deep hostility, and this feeling was aggravated in many instances by their discriminatory or excessive rates, by administrative abuses, and by interference in local politics. The State legislatures responded to popular demand with regulatory acts, some of which established a tariff of charges which the corporations were forbidden to exceed. Then again arose the question of the applicability of the guarantees of the Fourteenth Amendment. Corporations were "persons" in law and they contended that these regulatory acts deprived them of property without due process of law.

Under our Federal system, however, there is reserved to the States a broad field for governmental activity in the so-called "police power," once defined by Chief Justice Shaw, of Massachusetts (Commonwealth *v.* Alger, 7 Cushing, 53), as "the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth and the subjects thereof." Various forms of business had long been subject to regulation under this police power, and the Supreme Court decided that the fixing of railroad and elevator charges was permissible.

It is impossible to formulate a definite rule as to when the exercise of the police power is within the competence of the State, and when it constitutes a deprivation of liberty and property "without due process of law." Its exercise has become more and more common with the growth of population, the increasing complexity of social and economic life, and the general decline of individualistic theories of government. Consequently there is an endless succession of cases on the docket of the Supreme Court contesting the competence of State legislative bodies to pass laws which, with the alleged object of promoting the general well-being, infringe on what some person considers the rights guaranteed to him by the Fourteenth Amendment.

8. *Munn* v. *Illinois* [1]

Mr. Chief Justice Waite delivered the opinion of the court.

The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative powers of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant—

1. To that part of sect. 8, art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States";

2. To that part of sect. 9 of the same article, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another"; and

3. To that part of amendment 14 which ordains that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

Supreme Court of the United States, 1876. 94 United States, 113.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guarantee against any encroachments upon an acknowledged right of citizenship by the legislatures of the States. . . .

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. . . . This does not confer power upon the whole people to control rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation

came within any of the constitutional prohibitions against interference with private property. . . .

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control. . . . It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the

greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity (of grain) received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the largest traffic between the citizens of the country north and west of Chicago and the citizens of the country lying on the Atlantic coast north of Washington is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the seashore, and forms the largest part of interstate commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels, which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has,

therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll." Certainly, if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts. . . .

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that

what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts. . . .

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall. 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one State over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the States in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is

not repugnant to the Constitution of the United States, and that there is no error in the judgment. . . .

9. *The Chicago, Burlington and Quincy Railroad Company* v. *Iowa* [1]

Mr. Chief Justice Waite delivered the opinion of the court.

Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest and, under the decision in Munn *v.* Illinois, just announced, subject to legislative control as to their rates of fare and freight, unless protected by their charters.

10. *Peik* v. *Chicago and Northwestern Railway Company* [2]

Mr. Chief Justice Waite delivered the opinion of the court.

These suits present the single question of the power of the legislature of Wisconsin to provide by law for a maximum of charge to be made by the Chicago and Northwestern Railway Company for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without. . . .

As to the effect of the statute as a regulation of interstate commerce. The law is confined to State commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for

[1] Supreme Court of the United States, 1876. 94 United States, 155.
[2] *Ibid.*, 1876. 94 United States, 164.

those within, even though it may indirectly affect those without. . . .

As to the claim that the courts must decide what is reasonable, and not the legislature. This is not new to this case. It has been fully considered in Munn *v.* Illinois. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change. . . .

11. *Pembina Mining Co.* v. *Pennsylvania*[1]

The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of "person" there is no doubt that a private corporation is included. Such corporations are merely associates of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men." Providence Bank *v.* Billings, 4 Pet. 514, 562. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State.

12. *Barbier* v. *Connolly*[2]

Mr. Justice Field delivered the opinion of the court.

In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the constitution

[1] Supreme Court of the United States, 1888. 125 United States, 181.
[2] *Ibid.*, 1885. 113 United States, 27.

of the State. Our jurisdiction is confined to a consideration of the Federal question involved, which arises upon an alleged conflict of the fourth section in question with the first section of the Fourteenth Amendment of the Constitution of the United States. No other part of the amendment has any possible application.

That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a Federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and board of fire wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same

business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary re-

strictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment.

In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us the provisions requiring certificates from the health officer and the board of fire wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual.

PART TWO. THE EXTENSION OF FEDERAL AUTHORITY

CHAPTER VI

THE FEDERAL REGULATION OF COMMERCE

In Peik *v.* Chicago and Northwestern Railway Company, and in Chicago, Burlington and Quincy Railroad Company *v.* Iowa, the Supreme Court not only ruled that intrastate rates were entirely within the jurisdiction of the State but that in the absence of congressional legislation it was permissible for the State to regulate rates indirectly affecting commerce outside its limits. This dictum had given the States an advantage which they were prompt to utilize, greatly to the detriment of orderly and uniform rate-making. In the Wabash decision the Supreme Court, three members dissenting, supplemented the decision handed down in 1876 by declaring that no burden might be laid on interstate commerce. The confusion produced by diverse regulatory efforts had already led to a movement to establish Federal control, and this decision gave added impetus to it. The outcome was the act of 1887. In the Maximum Freight Rate Case the Supreme Court decided that the Interstate Commerce Commission had no authority to fix rates. It was becoming more and more apparent, however, that such authority was necessary for the protection of shippers and carriers alike.

13. *Wabash, St. Louis and Pacific Railway Company* v. *Illinois* [1]

Mr. Justice Miller delivered the opinion of the court. . . .

The first count in the declaration, which is referred to in this memorandum of agreement, charged that the Wabash, St. Louis and Pacific Railway Company had, in violation of a statute of the State of Illinois, been guilty of an unjust discrimination in its rates or charges of toll and compensation for the transportation of freight. . . .

If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For

[1] Supreme Court of the United States, 1886. 118 United States, 557.

instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State which is not subject to the constitutional provision, and the distinction between commerce among the States and the other class of commerce between the citizens of a single State, and conducted within its limits exclusively, is one which has been fully recognized in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other. . . .

It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State. The Supreme Court of Illinois having in this case given an interpretation which makes it apply to what we understand to be commerce among the States, although the contract was made within the State of Illinois, and a part of its performance was within the same State, we are bound, in this court, to accept that construction. It becomes, therefore, necessary to inquire whether the charge exacted from the shippers in this case was a charge for interstate transportation, or was susceptible of a division which would allow so much of it to attach to commerce strictly within the State, and so much more to commerce in other States. The transportation, which is the subject-matter of the contract, being the point on which the decision of the case must rest, was it a transportation lim-

ited to the State of Illinois, or was it a transportation covering all the lines between Gilman in the one case and Peoria in the other in the State of Illinois, and the city of New York in the State of New York?

The Supreme Court of Illinois does not place its judgment in the present case on the ground that the transportation and the charge are exclusively State commerce, but, conceding that it may be a case of commerce among the States, or interstate commerce, which Congress would have the right to regulate if it had attempted to do so, argues that this statute of Illinois belongs to that class of commercial regulations which may be established by the laws of a State until Congress shall have exercised its power on that subject; and to this proposition a large part of the argument of the Attorney-General of the State before us is devoted, although he earnestly insists that the statute of Illinois which is the foundation of this action, is not a regulation of commerce within the meaning of the Constitution of the United States. . . .

We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits, for a transportation which constitutes a part of commerce among the States, is a valid law.

Let us see precisely what is the degree of interference with transportation of property or persons from one State to another which this statute proposes. . . .

The owner of corn, the principal product of the country, desiring to transport it from Peoria, in Illinois, to New York, finds a railroad company willing to do this at the rate of fifteen cents per hundred pounds for a carload, but is compelled to pay at the rate of twenty-five cents per hundred pounds, because the railroad company has received from a person residing at Gilman twenty-five cents per hundred pounds for the transportation of a carload of the same class of freight over the same line of road from Gilman to New York. This is the result of the statute of Illinois, in its endeavor to prevent unjust discrimination, as construed by the Supreme Court of that State.

The effect of it is, that whatever may be the rate of transportation per mile charged by the railroad company from Gilman to Sheldon, a distance of twenty-three miles, in which the loading and unloading of the freight is the largest expense incurred by the railroad company, the same rate per mile must be charged from Peoria to the city of New York.

The obvious injustice of such a rule as this, which railroad companies are by heavy penalties compelled to conform to, in regard to commerce among the States, when applied to transportation which includes Illinois in a long line of carriage through several States, shows the value of the constitutional provision which confides the power of regulating interstate commerce to the Congress of the United States, whose enlarged view of the interest of all the States, and of the railroads concerned, better fits it to establish just and equitable rules.

Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State, it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States cannot be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois Court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the

Congress of the United States under the commerce clause of the Constitution. . . .

14. *Summary of "An Act to Regulate Commerce"* [1]

Section 1. It applies to freight and passengers by land; or by land and water in cases of continuous or through shipment, even to foreign countries. "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 2. Rebates and personal discrimination of every sort forbidden.

Section 3. Local discrimination forbidden; equal facilities for interchange of traffic with connecting lines prescribed.

Section 4. Long and short haul clause: "That it shall be unlawful for any common carrier subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

[1] *United States Statutes at Large*, XXIV, 379. February 4, 1887.

Section 5. All pooling and traffic agreements prohibited.

Section 6. All rates and fares to be printed and posted for public inspection at all stations; and filed with the Commission at Washington. No advance in rates except after ten days' notice. All charges, other than as published, forbidden.

Section 9. Procedure by complaint before the Commission or Federal courts. Power to compel testimony and production of papers.

Section 10. Penalty of $5000 for each offence in violation. (Amended in 1889, adding imprisonment.)

Section 11. Interstate Commerce Commission of five members established; by Presidential appointment; term six years.

Section 12. Powers of Commission to inquire, with right to obtain full information necessary to exercise of its authority. Power over witnesses and production of papers, to be sustained by U. S. Circuit Courts.

Section 13–14. Procedure before Commission by complaint. Parties competent to appear. Decisions to include findings of fact upon which they are based. for use of courts on appeal.

Section 15. Duty of Commission to notify carriers to "cease and desist" from violation, or to make reparation for injury done.

Section 16. To enforce obedience, procedure by petition of Commission in Federal courts, which may issue writs.

Section 20. Annual detailed reports from carriers as to finance, operation, rates or regulations in prescribed forms as desired by the Commission.

15. *The Maximum Freight Rate Case* [1]

[The Interstate Commerce Commission, having found the rates charged by certain railroads unreasonable and unjust, issued an order requiring them to readjust their tariffs to specified rates. Upon the railroads failing to comply with this order, the Commission instituted a suit

[1] Supreme Court of the United States, 1896. 167 United States, 479.

in the Circuit Court of the United States to compel obedience thereto. When this court entered a decree dismissing this bill, an appeal was taken to the Supreme Court.]

Mr. Justice Brewer, . . . delivered the opinion of the court. . . .

Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and, if we examine the legislative and public history of the day, it is apparent that there was no serious thought of doing so.

The question debated is whether it vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many of the states of this Union. In England, while control

had been given in respect to discrimination and undue preferences, no power had been given to prescribe a tariff of rates. In this country, the practice has been varying. . . .

It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future, and this application to the court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Now, nowhere in the Interstate Commerce Act do we find words giving to the Commission power to "increase or reduce any of the rates"; "to establish rates of charges"; "to make and fix reasonable and just rates of freight and passenger tariffs"; "to make a schedule of reasonable maximum rates of charges"; "to fix tables of maximum charges"; to compel the carrier "to adopt such rate, charge or classification as said commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given. Whence then is it deduced? In the first section it is provided that "all charges . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Then follow sections prohibiting discrimination, undue preferences, higher charges for a short than for a long haul, and pooling, and also making provision for the preparation by the companies of schedules of rates, and requiring their publication. Section 11 creates the Interstate Commerce Commission. Section 12, as amended March 2, 1889 (25 Stat. 858), gives it authority to inquire into the management of the business of all common carriers, to demand full and complete information from them, and adds, "and the Commission is hereby authorized to execute and enforce the provisions of this act." And the argument is that, in enforcing and executing the provisions of the act, it is to execute and enforce the law as stated in the first section, which is that all charges shall be reasonable and just, and that every unjust and unreasonable charge is prohibited; that it

cannot enforce this mandate of the law without a determination of what are reasonable and just charges; and, as no other tribunal is created for such determination, therefore it must be implied that it is authorized to make the determination, and, having made it, apply to the courts for a mandamus to compel the enforcement of such determination. In other words, that though Congress has not, in terms, given the Commission the power to determine what are just and reasonable rates for the future, yet, as no other tribunal has been provided, it must have intended that the Commission should exercise the power. We do not think this argument can be sustained. If there were nothing else in the act than the first section, commanding reasonable rates, and the twelfth, empowering the Commission to execute and enforce the provisions of the act, we should be of the opinion that Congress did not intend to give to the commission the power to prescribe any tariff, and determine what for the future should be reasonable and just rates. The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative. . . .

Finally, the section provides that if any common carrier fails or neglects or refuses to file or publish its schedules as provided in the section, it may be subject to a writ of mandamus issued in the name of the people of the United States at the relation of the Commission. Now, but for this act it would be unquestioned that the carrier had the right to prescribe its tariff of rates and charges, subject to the limitation that such rates and charges should be reasonable. This section 6 recognizes that right, and provides for its continuance. It speaks of schedules showing rates and fares and charges which the common carrier "has established and which are in force." It does not say that the schedules thus prepared, and which are to be submitted to the Commission, are subject, in any way, to the latter's approval. Filing with the Commission and publication by posting in the various stations are all that is required, and are the only limitations placed on the carrier in respect to the fixing of its tariff. Not only is it

thus plainly stated that the rates are those which the carrier shall establish, but the prohibitions upon change are limited in the case of an advance by ten days' public notice, and on reduction by three days. Nothing is said about the concurrence or approval of the Commission, but they are to be made at the will of the carrier. Not only are there these provisions in reference to the tariff upon its own line; but, further, when two carriers shall unite in a joint tariff (and such union is nowhere made obligatory, but is simply permissive), the requirement is only that such joint tariff shall be filed with the Commission, and nothing but the kind and extent of publication thereof is left to the discretion of the Commission.

It will be perceived that the section contemplates a change in rates, either by increase or reduction, and provides the condition therefor; but of what significance is the grant of this privilege to the carrier if the future rate has been prescribed by an order of the Commission, and compliance with that order enforced by a judgment of the court in mandamus? The very idea of an order prescribing rates for the future, and a judgment of the court directing compliance with that order, is one of permanence. Could anything be more absurd than to ask a judgment of the court in mandamus proceedings that the defendant comply with a certain order, unless it elects not to do so? The fact that the carrier is given the power to establish in the first instance, and the right to change, and the conditions of such change specified, is irresistible evidence that this action on the part of the carrier is not subordinate to and dependent upon the judgment of the Commission.

We have, therefore, these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any ad-

ministrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and, if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission, or invest it with the power to exercise, the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the commission this power of fixing rates is the clear language of section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication; and, second, the filing of the tariff with the Commission. The grant to the Commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the Commission. . . .

Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the Commission, it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just. . . .

CHAPTER VII

FEDERAL REGULATION OF INTERSTATE RAILROAD RATES

Restrictive decisions by the Supreme Court had rendered the law of 1887 increasingly ineffective as a regulatory measure. In the late nineties there began an insistent demand for more stringent Federal control. This demand was strengthened by increasing freight rates, by the consolidation of formerly independent lines into great systems, and by popular belief that railroad corporations were exercising a dangerous influence in politics. By the acts of 1903 and 1906 the regulatory power of Congress over interstate commerce was extended to rate-making through the agency of the reorganized Interstate Commerce Commission.

The decision in the case of the Illinois Central Railroad Company *v.* Interstate Commerce Commission settled an extremely important point. Both the Elkins and Hepburn amendments had strengthened the position of the commission. Because of a bitter contest in Congress, however, the extent to which the orders of the commission were reviewable by the courts had been left without clear definition. In this Illinois Central Case the Supreme Court declined to pass upon the reasonableness or unreasonableness of the commission's orders. The court refused, as it said in another decision, to "substitute its judgment for that of the commission upon matters of fact within the commission's province." It confined its attention therefore to the scope of the commission's powers under the acts of Congress and to the legality of its orders. The possibility of defeating regulation by protracted litigation and delay was thereby eliminated.

16. *The Elkins Amendments to the Interstate Commerce Act* [1]

The so-called Elkins amendments to the Act of 1887, —the first changes of importance in its substantive clauses,—were made in 1903, in response to a demand of the carriers. . . . When the carriers themselves asked for more stringent legislation, it was accorded by Congress with commendable despatch. No opposition whatever appeared. Nor was there much debate. The ma-

[1] W. Z. Ripley, *Railroads: Rates and Regulation*, 492 *ff.* Reprinted by permission of Longmans, Green and Company, New York City.

chinery of legislation moved expeditiously and almost without noise to the desired end.

These Elkins amendments dealt solely with the provisions of law concerning observance of published tariffs. They in no wise affected the determination of what those tariffs should be. That problem of reasonableness was the bone of contention in the great struggle in Congress, hardly as yet under way but soon to follow. The changes in 1903, therefore, had mainly to do with penalties and legal procedure. They were, as elsewhere outlined, five in number. The railroad corporation itself,—and not merely its officers and agents as heretofore,—was made liable to prosecution and penalty. This put an end to the anomalous immunity hitherto enjoyed by the principal and beneficiary of a guilty transaction. Secondly, the penalty of imprisonment for departure from the published tariff,—added to the law in 1889 in the hope of rendering it more effective,—was removed. It had been hoped that the reluctance of witnesses to become parties to such condign punishment of associates might thus be somewhat overcome; especially since the liability to fines now ran to the corporation rather than to the individual. The third change in the law was of great importance, as it had been construed by the courts. Preferential treatment of shippers had been made to depend upon proof; first, that rates lower than as published in the tariff had actually been allowed; and, in the second place, that these full tariff rates, or, at least, higher rates, had been paid by others on like shipments at the same time. Such proof had turned out to be practically impossible in any general rate war; inasmuch as, at such times, rates were cut more or less substantially for all shippers alike. In other words, there might well be departure from the published rates, without preferential treatment. And it was the object of the law to put a stop to both of these abuses. The Elkins law, therefore, explicitly made the published tariff the standard of lawfulness. Any departure from it, proven by itself alone, was declared a misdemeanor. In the fourth place, the new law made shippers or any other interested parties defendants; whereas formerly

only the giver of rebates, not the recipient, could be prosecuted. This change rendering the guilty shipper liable, was an eminently proper one. And then, finally, the new law provided for the issuance of injunctions,—viz., peremptory orders punishable by contempt of court,—by any Federal judge whenever the Interstate Commerce Commission had reasonable ground for belief that any common carrier was deviating from the published tariff, "or is committing any discrimination forbidden by law." A summary prohibition from this judicial source, it was hoped, would act as a powerful deterrent.

17. *The Hepburn Act of* 1906 [1]

While the legislation of 1903 was effective in restricting the practice of personal discrimination, it did not solve that problem entirely and it contributed but little toward the solution of the other pressing and equally important problems of railway regulation, such as those of securing reasonable rates, of increasing the powers of the Interstate Commerce Commission, of regulating accounting practices, and of correcting other forms of discrimination. Increasing pressure was brought to bear upon Congress to modify the law of 1887, and in 1906 an amendment to that act was passed, by which its scope was vastly extended. The law of 1906, known as the Hepburn amendment, marked the real beginning of the regulation of railroad rates and services by the Federal Government. By it most of the defects of the law of 1887 were corrected.

The Hepburn amendment, in the first place, extended the scope of the Interstate Commerce Act by making it applicable not only to railroads, but to express companies, sleeping-car companies, and pipe lines for transporting oil or other commodities except water and gas. . . .

The provisions of the Act of 1887 with reference to reasonable rates, discrimination, interchange of traffic, the "long and short haul clause" and pooling were retained. . . . In an attempt to meet a form of discrimi-

[1] Johnson and Van Metre, *Principles of Railroad Transportation*, 513 *ff.* Reprinted by permission of D. Appleton and Company, New York City.

nation practiced by coal-carrying railroads which were heavily interested in mining the coal carried over their lines, a "commodities clause" was inserted in section one of the law, providing that no road should transport in interstate business "any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority . . . except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The requirements as to publicity of rates were retained and carriers were forbidden to engage in the transportation business unless schedules of rates were filed with the Interstate Commerce Commission and published in accordance with the provisions of the law. It was stipulated, moreover, that no change should be made in rates or fares except after 30 days' notice both to the public and to the Interstate Commerce Commission. The commission was given authority, however, to modify the requirements as to giving notice if good cause could be shown for such action. . . .

The Elkins Act against discrimination was strengthened by adding an amendment providing that any shipper receiving a rebate of any kind from a carrier should, for that practice, forfeit to the Federal Government a sum equal to three times the amount received in the form of rebates during a period of six years previous to the beginning of the action.

The most important and significant features of the Hepburn amendment were the provisions relating to the Interstate Commerce Commission. The membership of this body was increased from five to seven, with the provision that not more than four should be of the same political party, the term of office was changed from six to seven years, the annual salary of each member fixed at $10,000, and the powers and duties of the commission were greatly extended.

The leading change with respect to the powers of the commission was that it received the rate-making authority, which it had been denied under the law of 1887, by

the decision of the Supreme Court in the Maximum Freight Rate case. By section fifteen of the law, as revised in 1906, the commission was authorized, when, after full hearing upon a complaint, it should be of the opinion that any rates or charges or any regulations or practices affecting charges were "unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this Act" to "determine and prescribe" just and reasonable rates, regulations and practices to be thereafter observed by the offending carrier. It was stipulated that rates and fares so determined should be the maximum rates and fares which the railroad might charge. The commission was also authorized to establish through routes and joint rates, to prescribe the division of such rates, and to fix the compensation to be paid by a carrier to shippers who, as owners of property transported, should assist in its transportation by rendering service of any kind or by furnishing equipment for the use of the carrier.

Of almost equal importance with the provision authorizing the commission to issue orders fixing maximum rates was the provision declaring that all orders of the commission, except those for the payment of money, "shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction." Failure to comply with orders of the commission with respect to rates which were not set aside by judicial proceedings was made punishable by a fine of $5,000 for each offense, and in case of continuing violation it was stipulated that each day should be a separate offense. Under these provisions the carriers could no longer ignore the orders of the commission without fear of penalty, and the burden of initiating the litigation to test the validity of the commission's orders was in effect shifted to the carrier—a decided improvement over the provisions of the act of 1887, which required the

commission to initiate judicial proceedings before it could secure enforcement of its orders. It was provided, however, that if a carrier failed or neglected to obey any order of the commission, other than for the payment of money, the commission might apply to a Circuit Court for a writ of injunction or other process to compel obedience, and that the court should enforce the commission's order if after hearing it should appear that the order had been "regularly made and duly served."

Another great advance in regulation was made in the Hepburn Act by conferring upon the Interstate Commerce Commission the power to prescribe a uniform system of accounts for railroads engaged in interstate commerce. It was made unlawful for the carriers to keep accounts in any form other than that prescribed by the commission, or to destroy, mutilate or falsify their records. To make it possible for the commission to secure uniformity in accounting it was authorized to employ special agents and examiners to inspect all accounts and records of the carriers. The commission was also authorized to require from the carriers, in addition to the customary annual reports, monthly reports of earnings and expenses, and periodical and special reports concerning any matters about which the commission was required by law to keep informed. By this section of the law, publicity of railway operations was secured, which has afforded a measure of protection to the investing public and assistance to the commission in exercising its rate-making functions, while the railroads themselves have been able to practice the economies made possible by the scrutiny and comparison of well-kept standardized accounts.

One of the chief problems with which Congress was forced to wrestle in the preparation of the Hepburn Act was that of judicial review of the commission's orders. Should the courts be permitted to exercise the power of "broad review," that is, to base their decisions not only upon the law but also on their interpretation of the facts presented in the evidence, or should they be confined solely to the consideration of questions of law? No agree-

ment could be reached as to how the *power* of the courts should be stated, and in fact it was doubted whether Congress had authority to limit or define in any way the power of the Federal judiciary. . . . The result of the controversy in Congress was that nothing was stated in the Hepburn Act concerning the grounds upon which the courts might base their decisions when reviewing the orders of the commission. Authority was expressly given to Circuit Courts of the United States to annul, suspend, or set aside orders of the commission, but it was provided that no injunction should be issued restraining the enforcement of an order except on hearing after five days' notice to the commission.

18. *Interstate Commerce Commission* v. *Illinois Central Railroad Company* [1]

Mr. Justice White delivered the opinion of the court.

Whether a duty rested upon the Illinois Central Railroad Company to obey an order made by the Interstate Commerce Commission is the question here to be decided.

On the ground that preferences were created and discriminations engendered by regulations established by the railroad company concerning the daily distribution of coal cars to mines along its line in periods when the supply of such cars was inadequate to meet the demand upon it for the movement of coal, the order in question commanded the railroad company to desist from enforcing the regulations found to be preferential, and for a future period of two years to deliver cars to mines along its line in conformity with the rule announced by the commission. . . .

It is conceded in argument that bituminous coal mines, which are the character of mines here involved, must dispose of their produce as soon as the coal is delivered at the surface, as it is not practicable for an operator to store such coal, and the amount that a mine will produce is therefore directly dependent upon the quantity that can be taken away day by day. As a result of this situa-

[1] Supreme Court of the United States, 1909. 215 United States, 452.

tion it is also conceded that railroads upon whose lines coal mines are situated pursue a system by which daily deliveries of cars, based upon requisitions of the respective mines, are made to such mines to permit of the removal of their available output for that day. . . .

In a general sense, however, all the regulations of the various railroads, either for ascertaining the capacity of coal mines, or in order to determine the *pro rata* share for daily distribution of cars to the respective mines in case of shortage, dealt with four classes of cars: 1, system cars, that is, cars owned by the carrier and in use for the transportation of coal; 2, company fuel cars, that is, cars belonging to the company and used by it when necessary for the movement of coal from the mines on its own line, and which coal had been bought by the carrier and was used solely for its own fuel purposes; 3, private cars, that is, cars either owned by coal mining companies or shippers or consumers and used for the benefit of their owners in conveying coal from the mines to designated points of delivery; 4, foreign railway fuel cars, that is, cars owned by other railroad companies and which were by them delivered to the carriers on whose lines mines were situated, for the purpose of enabling the cars to be loaded with coal and returned to the company by whom the cars had been furnished, the coal being intended for use as fuel by such foreign railroad companies. . . .

On October 31, 1907, the Illinois Collieries Company filed with the Interstate Commerce Commission a complaint against the Illinois Central Railroad Company. The regulations of the railroad company as to the distribution of coal cars were assailed as unjustly discriminatory, in violation of the act to regulate commerce, particularly as respected the practice of not taking into consideration foreign railway fuel cars and private cars among the various coal operators along the lines of the railroad on interstate shipments of coal. . . .

The order of the commission, as heretofore stated, therefore not only directed the desisting from the practice of failing to take into account the foreign railway fuel cars, private cars, and the company fuel cars, but

also required the carriers to establish regulations for a period of two years from July 1, 1908, providing for the counting of all such cars. . . .

Being unwilling to comply with the order of the commission, the Illinois Central Railroad Company commenced the suit which is now before us to enjoin in all respects the enforcement of the order of the commission. . . .

The statute endowing the commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject.

Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, *viz.*, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

Power to make the order, and not the mere expediency or wisdom of having made it, is the question. While, as we have seen, the court below reasoned that the transportation of coal bought from a mine by the railroad company for its own use, after delivery to it in its coal cars at the tipple, was not commerce, because "commerce, under these circumstances ends at the tipple," it yet reasoned that such coal was within the control of the interstate commerce law to the extent that a regulation compelling its consideration, for the purpose of rating the capacity of a mine as a basis for fixing its *pro rata* share of cars in times of shortage, would be valid. Because of this reasoning, it is insisted, it appears that the court below but substituted a regulation which it deemed wise for one which it considered the commission had inexpediently adopted, and this upon the assumption by the court that its authority was not limited to determining power. . . .

In view, however, of the great importance of the questions directly arising for decision, and the fact that the court below has treated the company fuel cars as distinct, we shall not be sedulous to pursue the suggestion, and come at once to the propositions of power previously stated.

First. *That the act to regulate commerce has not delegated to the commission authority to regulate the distribution of company fuel cars in times of car shortage as a means of prohibiting unjust preferences or undue discrimination.*

When coal is received from the tipple of a coal mine into cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee, and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. In changed form, those propositions but embody the reasoning which led the court below to its conclusion that, under the circumstances, commerce ended at the tipple of the mine. The deduction from the proposition is, as the movement of coal under the conditions stated is not commerce, it is therefore not within the authority

delegated to the commission by the act of Congress, as all such acts have relation to the regulation of commerce, and do not, therefore, embrace that which is not commerce. It is to be observed, in passing, that if the proposition be well founded, it not only challenges the authority of the commission, but extends much further, and in effect denies the power of Congress to confer authority upon the commission over the subject. In all its aspects the proposition calls in question the construction given to the law by the commission in every case where the subject has been before it, and also assails the correctness of numerous decisions in the lower Federal court, to which we have previously referred, where the subject, in various forms, was considered. It goes further than this, since it, in effect, seeks to avoid the fair inferences arising from the regulations adopted by the railroad company. Those regulations, in providing for the obligation of the railroad company to supply cars, and recognizing the duty of equality of treatment, found it necessary, by express provision, to provide that private cars, foreign railway cars and company fuel cars should not be counted against the mine on the day when furnished, thus implying that, under the general rule of equality, if not restricted, it was considered the duty would exist to consider such cars. The contention, moreover, conflicts with the rule which, as we have seen, obtains in other and great systems of railroad, by which, for the purpose of avoiding inequality and preference, foreign railway fuel cars, private cars, and company fuel cars are made one of the factors upon which a mine is rated in order to fix the basis upon which its distributive share of cars is to be allotted in case of car shortage. And, from this, it must follow, if the proposition contended for be maintained, that it would not only relieve the railroad company, whose rights are here involved, from the obligation of taking into account its fuel cars in the making of the distribution, but from the duty even to consider them for the purpose of capacity rating. As a result, it would lead to the overthrow of the system of rating, prevailing on other railroads, by which, as we have

said, such cars are taken into account, a consequence which is well illustrated by the case of Logan Coal Co. *v.* Pennsylvania R. R. Co., 154 Fed. Rep. 497.

Under these conditions, it is clear that doubt, if it exists, must be resolved against the soundness of the contentions relied on. But that rule of construction need not be invoked, as we think, when the erroneous assumption upon which the proposition must rest is considered, its unsoundness is readily demonstrable. That assumption is this, that commerce in the constitutional sense only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on, a doctrine the unsoundness of which has been apparent ever since the decision in Gibbons *v.* Ogden, 9 Wheat. 1, and which has not since been open to question. It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one.

The corporation, as a carrier engaged in interstate commerce, being, then, as to its interstate commerce business, subject to the control exerted by the act to regulate commerce, and the instrumentalities employed for the purpose of such commerce, being likewise so subject to control, we are brought to consider the remaining proposition, which is,

Second. *That even if power has been delegated to the commission by the act to regulate commerce, the order whose continued enforcement was enjoined by the court below was beyond the authority delegated by the statute.*

In view of the facts found by the commission as to preferences and discriminations resulting from the failure to count the company fuel cars in the daily distribution in times of car shortage, and in further view of the far-

reaching preferences and discriminations alleged in the answer of the commission in this case, and which must be taken as true, as the cause was submitted on bill and answer, it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of sec. 3 of the act to regulate commerce, prohibiting preferences and discriminations. . . .

It follows from what we have said that the court below erred in enjoining the order of the commission, in so far as it related to company fuel cars, and its decree is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

CHAPTER VIII

FEDERAL REGULATION OF INTRASTATE RAILROAD RATES

In decisions already cited the Supreme Court had declared that there was within the States a commerce which might properly be regulated by their legislatures. It had made it equally clear that there was a commerce among the States which could only be regulated by the Federal Government. It was still an open question whether in the absence of congressional action a State in the proper exercise of its power to regulate intrastate commerce might make regulations indirectly affecting interstate commerce. This question was answered in the Minnesota Rate Cases. There remained a further question. Could the Federal Government in regulating interstate commerce directly or indirectly regulate intrastate commerce where operations were so interwoven that a purely intrastate regulation constituted discrimination against points outside the State? In the Shreveport Case the Supreme Court answered the question in the affirmative.

19. *The Mann-Elkins Amendment to the Interstate Commerce Act*[1]

While the Hepburn amendment went a long way toward correcting the defects of the act of 1887, still other changes in the law were deemed advisable, and in 1910 the Mann-Elkins amendment was passed, extending the powers of the Interstate Commerce Commission, altering the procedure in judicial review of the commission's orders, and making other important changes.

A radical addition to the power of the commission was made by vesting that body with authority to suspend changes in railway rates. It was stipulated that whenever a carrier should file with the commission any schedule stating a new rate or fare, or classification or practice affecting rates or fares, the commission might, either upon its own initiative or upon complaint, enter upon an investigation of the reasonableness of the pro-

[1] Johnson and Van Metre, *Principles of Railroad Transportation*, 521 *ff.* Reprinted by permission of D. Appleton and Company, New York City.

posed change, and, pending the investigation, might suspend the new schedule for a period of not more than 120 days beyond the time when the schedule would otherwise become effective. If the hearing could not be concluded within the original period of suspension (120 days), the time of suspension might be extended for a further period, not exceeding six months. After full hearing, whether completed before or after the change went into effect, the commission might make such order in reference to the fare, rate, or classification as would be proper in a proceeding initiated after the change became effective. It was stipulated that at any hearing involving a rate increased after January 1, 1910, or a rate sought to be increased after the enactment of the law, the burden of proof to show that the increased rate or proposed increased rate was just and reasonable should be upon the carrier. It was by this provision of the law that the railroads of the eastern part of the United States were prevented in 1910 and again in 1913 from increasing their rates. The discretionary power of the commission was enormously increased and its control over interstate rates, with respect to increases, at least, was rendered virtually absolute.

Another noteworthy feature of the law of 1910 was the revision of the long and short haul clause contained in the fourth section of the Interstate Commerce Act. It will be remembered that this clause, as expressed in the act of 1887, had been of but little effect because of the interpretation by the courts of the words "under substantially similar circumstances and conditions." These words were now removed, and carriers were prohibited from charging more for a shorter than for a longer haul over the same line and in the same direction, the shorter being included within the longer distance, unless they were expressly authorized to do so by the commission. Two other minor changes were made in the fourth section: carriers were forbidden to charge a greater compensation as a through rate than the aggregate of the intermediate rates over the same line or route; and railroads reducing rates at any time because of water com-

petition were forbidden to raise such rates again, unless, after a hearing before the commission, it could be shown that the proposed increase rested upon changed conditions other than the elimination of water competition.

The third leading feature of the Mann-Elkins Act was the creation of a special Commerce Court to hear (1) suits brought to enforce the orders of the Interstate Commerce Commission, other than for the payment of money, (2) suits brought to set aside orders of the commission, (3) cases involving the provisions of the Elkins Act of 1903 concerning rebates and departures from published tariffs, and (4) proceedings concerning the enforcement of the orders of the commission with regard to accounts, the movement of traffic and the providing of facilities. The new court was to be composed of five judges designated by the Chief Justice of the Supreme Court from among the circuit judges of the United States, each to serve for five years, except that in the first instance the court was to consist of five additional circuit judges whom the President should appoint and who should serve one, two, three, four and five years, respectively, as the President should designate. It was stipulated that after 1914 no judge should be reappointed to the court until the expiration of at least one year after the conclusion of a previous term of service. It was hoped that the new court would not only bring about more expeditious action in the suits it was authorized to try, but that it would conduce to a greater degree of specialization in its field of jurisdiction. In theory, at least, the court was a highly desirable addition to the machinery for Federal railway regulation. Unfortunately, the court, as originally constituted, met with general disfavor, and in October 1913 it was abolished and its duties assigned to the Federal district courts.

20. *The Minnesota Rate Cases*[1]

Mr. Justice Hughes delivered the opinion of the court. These suits were brought by stockholders of the North-

[1] Supreme Court of the United States, 1913. 230 United States, 352.

ern Pacific Railway Company, the Great Northern Railway Company and the Minneapolis & St. Louis Railroad Company, respectively, to restrain the enforcement of two orders of the Railroad & Warehouse Commission of the State of Minnesota, and two acts of the legislature of that State, prescribing maximum charges for transportation of freight and passengers, and to prevent the adoption or maintenance of these rates by the railroad companies. . . . [The peculiarity of these cases arose out of the position of border towns in Minnesota through which these interstate railroad companies' lines passed. It was contended that the lower rates enforced by Minnesota gave the shippers of these towns an unfair advantage over their competitors in towns lying just across the state line, in Wisconsin and North Dakota. The railroads were therefore forced to reduce interstate rates in these adjoining States to a substantial parity with those in Minnesota.]

The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several States is supreme and plenary. . . .

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. . . .

The principle, which determines this classification, underlies the doctrine that the States cannot, under any guise, impose direct burdens upon interstate commerce.

For this is but to hold that the States are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains.

Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. . . .

But within these limitations there necessarily remains to the States until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State

appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible. . . .

These principles apply to the authority of the State to prescribe reasonable maximum rates for intrastate transportation. . . .

As a power appropriate to the territorial jurisdiction of the State, it is not confined to a part of the State, but extends throughout the State—to its cities adjacent to its boundaries as well as to those in the interior of the State. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this state-wide authority controls the carrier, and is not controlled by it; and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the State's border, is foreign to our jurisprudence. . . .

Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a

unified control over interstate and intrastate rates; it did not set up a standard for interstate rates, or prescribe, or authorize the commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the States without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject. . . .

The decisions of this court since the passage of the act to regulate commerce have uniformly recognized that it was competent for the State to fix such rates, applicable throughout its territory. . . .

It thus clearly appears that, under the established principles governing State action, the State of Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction and not opposed to any action thus far taken by Congress.

The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. . . .

If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the

State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power. . . .

21. *The Shreveport Rate Case*[1]

Mr. Justice Hughes delivered the opinion of the court.

These suits were brought in the Commerce Court by the Houston, East & West Texas Railway Company, and the Houston & Shreveport Railroad Company, and by the Texas & Pacific Railway Company, respectively, to set aside an order of the Interstate Commerce Commission, dated March 11, 1912, upon the ground that it exceeded the Commission's authority. . . .

The order of the Interstate Commerce Commission was made in a proceeding initiated in March, 1911, by the Railroad Commission of Louisiana. The complaint was that the appellants, and other interstate carriers, maintained unreasonable rates from Shreveport, Louisiana, to various points in Texas, and, further, that these carriers, in the adjustment of rates over their respective lines unjustly discriminated in favor of traffic within the state of Texas and against similar traffic between Louisiana and Texas. The carriers filed answers; numerous pleas of intervention by shippers and commercial bodies were allowed; testimony was taken and arguments were heard.

The gravamen of the complaint, said the Interstate Commerce Commission, was that the carriers made rates out of Dallas and other Texas points into eastern Texas which were much lower than those which they extended into Texas from Shreveport. The situation may be briefly described: Shreveport, Louisiana, is about 40 miles from the Texas state line, and 231 miles from Houston, Texas, on the line of the Houston, East & West Texas and Houston & Shreveport Companies (which are affiliated in interest); it is 189 miles from Dallas, Texas, on the line of the Texas & Pacific. Shreveport competes with both cities for the trade of the intervening territory. The

[1] Supreme Court of the United States, 1914. 234 United States, 342.

rates on these lines from Dallas and Houston, respectively, eastward to intermediate points in Texas were much less, according to distance, than from Shreveport westward to the same points. It is undisputed that the difference was substantial and injuriously affected the commerce of Shreveport. It appeared, for example, that a rate of 60 cents carried first-class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport. The first-class rate from Houston to Lufkin, Texas, 118.2 miles, was 50 cents per 100 pounds, while the rate from Shreveport to the same point, 112.5 miles, was 69 cents. The rate on wagons from Dallas to Marshall, Texas, 147.7 miles, was 36.8 cents, and from Shreveport to Marshall, 42 miles, 56 cents. The rate on furniture from Dallas to Longview, Texas, 124 miles, was 24.8 cents, and that from Shreveport to Longview, 65.7 miles, was 35 cents. These instances of difference in rates are merely illustrative; they serve to indicate the character of the rate adjustment.

The Interstate Commerce Commission found that the interstate class rates out of Shreveport to named Texas points were unreasonable, and it established maximum class rates for this traffic. These rates, we understand, were substantially the same as the class rates fixed by the Railroad Commission of Texas, and charged by the carriers, for transportation for similar distances in that state. The Interstate Commerce Commission also found that the carriers maintained "higher rates from Shreveport to points in Texas" than were in force "from cities in Texas to such points under substantially similar conditions and circumstances," and that thereby "an unlawful and undue preference and advantage" was given to the Texas cities and a "discrimination" that was "undue and unlawful" was effected against Shreveport. In order to correct this discrimination, the carriers were directed to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged for the

carriage of such commodity from Dallas and Houston toward Shreveport for equal distances, as the Commission found that relation of rates to be reasonable. . . .

The invalidity of the order in this aspect is challenged upon two grounds:

(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

(2) That, if it be assumed that Congress has this power, still it has not been exercised, and hence the action of the commission exceeded the limits of the authority which has been conferred upon it.

. . . It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several states. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. . . .

Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement"; to adopt measures "to promote its growth and insure its safety"; "to foster, protect, control, and restrain." Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appro-

priate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the Nation, would be supreme within the national field. . . .

In Baltimore & Ohio Railroad Co. *v.* Interstate Commerce Commission, *supra*, the argument against the validity of the Hours of Service Act (March 4, 1907, chap. 2939, 34 Stat. at L. 14, 15, U. S. Comp. Stat. Supp. 1911, p. 1321) involved the consideration that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employees so that those who were engaged in interstate commerce should be confined to that commerce exclusively. Employees dealing with the movement of trains were employed in both sorts of commerce; but the court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers, or by the commingling

of duties relating to interstate and intrastate operations. Again, in Southern Railway Co. *v.* United States, 222 U. S. 20, 26, 27 . . . , the question was presented whether the amendment to the Safety Appliance Act (March 2, 1903, 32 Stat. at L. 943, chap. 976, U. S. Comp. Stat. Supp. 1911, p. 1314) was within the power of Congress in view of the fact that the statute was not confined to vehicles that were used in interstate traffic, but also embraced those used in intrastate traffic. The court answered affirmatively, because there was such a close relation between the two classes of traffic moving over the same railroad as to make it certain that the safety of the interstate traffic, and of those employed in its movement, would be promoted in a real and substantial sense by applying the requirements of the act to both classes of vehicles. So, in the Second Employers' Liability Cases, *supra*, it was insisted that while Congress had the authority to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all were engaged in interstate commerce, that power did not embrace instances where the negligent employee was engaged in intrastate commerce. The court said that this was a mistaken theory, as the causal negligence when operating injuriously upon an employee engaged in interstate commerce had the same effect with respect to that commerce as if the negligent employee were also engaged therein. . . .

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil, is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a state may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden.

It is also to be noted—as the Government has well said in its argument in support of the Commission's order—that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the state cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. . . . It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely, by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound

to reduce the latter below what it may deem to be a proper standard, fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates, and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer. . . .

CHAPTER IX

JUDICIAL REVIEW OF RATES

In Munn *v.* Illinois and Peik *v.* Chicago and Northwestern Railway Company the Supreme Court had held that the reasonableness of rates was a matter for legislative determination, not judicial. This doctrine if adhered to had dangerous possibilities. State legislatures, inspired by hostility toward railroad corporations, could, by punitive regulation of rates and fares, destroy property values and inflict great injury on the owners and creditors of the lines. In the case of Stone *v.* Farmers' Loan & Trust Company (1885) the court receded slightly from its earlier position, declaring that "under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of property for public use without just compensation, or without due process of law."

By 1889 only three of the justices remained who had been on the bench when the Munn Case was decided in 1876. When in Chicago, Milwaukee and St. Paul Railroad Company *v.* Minnesota the court reversed its earlier opinion, Justice Bradley still maintained that the legislature was the proper tribunal for the settlement of such questions. In Reagan *v.* Farmers' Loan & Trust Company and Smyth *v.* Ames the revolutionary process was practically completed. Public interests were protected by admitting the power of legislatures to regulate, while the interests of the owners and security-holders were safeguarded by denying the power to confiscate.

22. *Chicago, Milwaukee and St. Paul Railroad Company* v. *Minnesota* [1]

[A statute of Minnesota had created a Railroad and Warehouse Commission with power to revise transportation rates which seemed unequal and unreasonable. This commission reduced the rate for carrying milk between certain points from three cents to two and a half cents; and the Minnesota courts refused to admit evidence submitted by the railroad that the latter rate was unreasonable. The State courts held that the findings of the commission were conclusive. From this opinion the railroad appealed to the Federal Supreme Court on the

[1] Supreme Court of the United States, 1889. 134 United States, 418.

ground that the refusal of judicial review by the State courts deprived it of property without due process of law.]

Mr. Justice Blatchford . . . delivered the opinion of the court.

This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the State court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the commission "shall declare to be equal and reasonable," and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the

commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was or how the result was arrived at.

By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. . . .

Mr. Justice Bradley dissenting:

I cannot agree to the decision of the court in this case. It practically overrules Munn *v.* Illinois, 94 U. S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one. This is a principle which I regard as of great importance. When a railroad

company is chartered, it is for the purpose of performing a duty which belongs to the State itself. It is chartered as an agent of the State for furnishing public accommodation. The State might build its railroads if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. . . . But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is preëminently a legislative one, involving considerations of policy as well as of remuneration; and is usually determined by the legislature by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. . . . Thus, the legislature either fixes the charges at rates which it deems reasonable; or merely declares that they shall be reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat: when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there; then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary; I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it

there. It is always a delicate thing for the courts to make an issue with the legislative department of the government, and they should never do so if it is possible to avoid it. By the decision now made we declare, in effect, that the judiciary, and not the legislature, is the final arbiter in the regulation of fares and freights of railroads and the charges of other public accommodations. It is an assumption of authority on the part of the judiciary which, it seems to me, with all due deference to the judgment of my brethren, it has no right to make. . . . It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for that purpose. . . . It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But such is the constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people have always a remedy in their hands; they may at any time restrain them by constitutional limitations. . . .

23. *Reagan* v. *Farmers' Loan and Trust Company* [1]

[On April 3, 1891, the Legislature of Texas passed an act to establish a railroad commission with power, among other things, to regulate rates for the transportation of passengers and freight. The commission was directed to

[1] Supreme Court of the United States, 1894. 154 United States, 362.

make "reasonable rates"; before these were fixed, the railroad companies to be affected were entitled to notice and a hearing. The rates fixed were to be incontrovertible and to be deemed reasonable, fair, and just, until finally found otherwise upon a direct action brought by the dissatisfied party, such actions to take precedence of all others on the docket. In the trial of these actions "the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations [&c.], complained of are unreasonable and unjust." Under this act the plaintiffs in error were appointed commissioners, and after due proceedings established regulations. The defendant in error above named, as trustee under an instrument to secure certain bonds of the International and Great Northern Railroad Company, filed a bill in the Circuit Court of the United States for the Western District of Texas to restrain the commissioners and the Attorney-General from enforcing these regulations, alleging them to be unreasonable and unjust. From a decree in favor of the plaintiffs below, the commissioners and the Attorney-General appealed to the Supreme Court.]

Mr. Justice Brewer . . . delivered the opinion of the court.

. . . It appears from the bill that, in pursuance of the powers given to it by this act, the state commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the government and beyond examination by the courts.

It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted

to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. In Chicago, Burlington & Quincy Railroad *v.* Iowa, 94 U. S. 155, and Peik *v.* Chicago & Northwestern Railway, 94 U. S. 164, the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. . . .

These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property

for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore, within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission.

A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility of handling, etc.; it is recognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars, rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or

sustain this act of quasi legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this.

We pass then to the remaining question, Were the rates, as prescribed by the commission, unjust and unreasonable? . . .

But we do hold that a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force. . . .

24. *Smyth* v. *Ames* [1]

Mr. Justice Harlan delivered the opinion of the court. . . . In view of the adjudications these principles must be regarded as settled:

[1] Supreme Court of the United States, 1898. 169 United States, 466.

1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. . . .

In our opinion, the broad proposition advanced by counsel involves some misconception of the relations between the public and a railroad corporation. It is unsound in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the State. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain

and to charge tolls was given primarily for the benefit of the public. It is under governmental control though such control must be exercised with due regard to the constitutional guarantees for the protection of its property. . . . It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. . . .

A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may by legislation protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question. . . .

We hold, however, that the basis of all calculations as

to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. . . .

CHAPTER X

THE TRANSPORTATION ACT OF 1920

As government supervision and regulation of railroads became more and more drastic, authorities on the subject realized that this policy involved dangers hitherto unforeseen by the public. Regulation, it was pointed out, was making capital increasingly suspicious of railroad investment. Extensions and betterments were discouraged and it was difficult in some cases for the roads to maintain existing standards of service. Railroad officials claimed that governmental requirements served to increase operating expenses while denying the opportunity to make corresponding advances in rates. They were further embarrassed by the demands of highly organized bodies of employees for better wages; by the unfriendly attitude of shippers and the general public, a heritage from the days of the Granger movement; and by the ever-growing factor of motor-vehicle competition. The net result, they argued, was to keep the transportation facilities of the country below the needs of its steadily expanding industry and commerce.

The inability of the railroads to handle satisfactorily the burdens of war-time traffic lent considerable force to the above contentions. In an effort to meet the demands of the situation, there was a resort to government operation. As a war measure this was probably unavoidable, but the experiment proved generally unsatisfactory. The demoralization of 1917–20, however, furnished convincing evidence that the situation required statesmanlike handling, and, if necessary, the abandonment of some policies hitherto followed. The Transportation Act of 1920 is probably one of the most important enactments dealing with interstate commerce ever passed by Congress. Some of its objects are set forth by Chief Justice Taft in the Wisconsin Passenger Fares Case. The act definitely abandons the old position of hostility toward combination. It proposes regional consolidations under which stronger and weaker systems would be combined so as to serve best the areas controlled. Rates would be such as to permit a fair return on the aggregate value of this property. Undoubtedly there will be much experimentation and considerable amendatory legislation in the near future. The following decisions will show, however, how great is the extension of Federal authority involved, both as respects the rights of the State and the rights of private property.

25. *Wisconsin Passenger Fares Case* [1]

Mr. Chief Justice Taft delivered the opinion of the court.

[1] Supreme Court of the United States, 1922. Railroad Commission of Wisconsin *v.* Chicago, Burlington and Quincy Railroad Company, 257 United States, 563.

The Commission's order, interference with which was enjoined by the District Court, effects the removal of the unjust discrimination found to exist against persons in interstate commerce, and against interstate commerce by fixing a minimum for intrastate passenger fares in Wisconsin at 3.6 cents per mile per passenger. This is done under paragraph 4 of Sec. 13 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, which authorizes the Interstate Commerce Commission, after a prescribed investigation, to remove

"Any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable or unjust discrimination against interstate commerce."

We have two questions to decide.

First. Do the intrastate passenger fares work undue prejudice against persons in interstate commerce, such as to justify a horizontal increase of them all?

Second. Are these intrastate fares an undue discrimination against interstate commerce as a whole which it is the duty of the Commission to remove?

We shall consider these in their order.

First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travellers in interstate commerce and against localities (Houston, East & West Texas Ry. *v.* United States, 234 U. S. 342) in typical instances numerous enough to justify a general finding against a large class of fares. . . .

The order in this case, however, is much wider than the orders made in the proceedings following the Shreveport and Illinois Central Cases. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the State to border points. But this order is not so restricted. It includes fares between all interior points although neither may be near the border and the fares

between them may not work a discrimination against interstate travellers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted, cannot give the order validity. As said by this Court in the Illinois Central R. R. Case, "it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute, otherwise valid, unless, and except so far as, it conforms to a high standard of certainty." . . .

If, in view of the changes, made by federal authority, in a large class of discriminating state rates, it is necessary from a state point of view to change non-discriminating state rates to harmonize with them, only the state authorities can produce such harmony. We cannot sustain the sweep of the order in this case on the showing of discrimination against persons or places alone.

Second. The report of the Commission shows that if the intrastate passenger fares in Wisconsin are to be limited by the statute of that State to 2 cents per mile, and charges for extra baggage and sleeping car accommodations are to be reduced in a corresponding degree, the net income of the interstate carriers of the State will be cut six millions of dollars below what it would be under intrastate rates on the same level with interstate rates. Under paragraphs 3 and 4 of Sec. 13 and Sec. 15a as enacted in Secs. 416 and 422 respectively of the Transportation Act of 1920, are such reduction and disparity an "undue, unreasonable and unjust discrimination against interstate or foreign commerce" which the Interstate Commerce Commission may remove by raising the intrastate fares? A short reference to the circumstances inducing the legislation and a summary of its relevant provisions will aid the answer to this question. . . .

From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by

the Federal Government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the Government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses. . . .

Under Title IV, amendments were made to the Interstate Commerce Act which included Sec. 13, paragraphs 3 and 4, and Sec. 15a. . . . The former for the first time authorizes the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce—a power already indirectly exercised as to persons and localities, with approval of this Court in the Shreveport and other cases. The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years, the return is to be 5½ per cent., with ½ per cent. for improvements, and thereafter is to be fixed by the Commission.

The act sought to avoid excessive incomes accruing, under the operation of Sec. 15a, to the carriers better circumstanced by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, 1st, the issuing of future railroad securities by the interstate carriers; 2nd, the regulation of their car supply and distribution and the joint use of terminals; and, 3rd, their construction of new lines, and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only

refer to them to show the scope of the congressional purpose in the act.

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Sec. 15a to be one of the purposes of the bill.

Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent. of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its powers to prescribe just and reasonable rates," i. e., powers derived from previous amendments to the Interstate Commerce Act, which

have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, Sec. 13, however, and find the Commission for the first time vested with a direct power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it is impossible to escape the dovetail relation between that provision and the purpose of Sec. 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an "undue, unreasonable, and unjust discrimination against interstate or foreign commerce," within the ordinary meaning of those words.

Counsel for appellants, not able to satisfy their meaning by the suggestion of any other discrimination to which they apply, are forced to the position that the words are tautological and a mere repetition of "any undue or unreasonable advantage, preference or prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand," which precede them. In view of their apt application to the most important purpose of the legislation, we are not at liberty to take such a view. If "undue, unreasonable and unjust discrimination against interstate or foreign commerce" are tautological, why are they followed by the phrase "which is hereby prohibited and declared to be unlawful"? To accompany a meaningless phrase with words of such special emphasis would be unusual.

It is urged that in previous decisions, notably the Minnesota Rate Cases, 230 U. S. 352, the Shreveport Case, *supra*, and the Illinois Central Case, *supra*, the expression "unjust discrimination against interstate commerce" was often used when, as the law then was, it could only mean discrimination as between persons and localities, and therefore that it is to be given the same limited meaning here. But, here, the general words are used after discrimination against persons and localities have been specifically mentioned. The natural inference is that even if they include what has gone before, they

mean something more. When we find that they aptly include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important and which would seriously obstruct its chief purpose, we cannot ignore their necessary effect. . . .

It is objected here as it was in the Shreveport Case that orders of the Commission which raise the intrastate rates to a level of the interstate structure, violate the specific proviso of the original Interstate Commerce Act repeated in the amending acts, that the Commission is not to regulate traffic wholly within a State. To this, the same answer must be made as was made in the Shreveport Case (234 U. S. 342, 358), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso. . . .

Counsel for the appellants have not contested the constitutional validity of the statute construed as we have construed it, although the counsel for the state commissions whom we permitted to file briefs as *amici curiae* have done so. The principles laid down by this court in the Minnesota Rate Cases, 230 U. S. 352, 432, 433, the Shreveport Case, 234 U. S. 342, 351, and the Illinois Central Case, 245 U. S. 493, 506, which are rate cases, and in the analogous cases . . . we think, leave no room for discussion on this point. Congress in its control of its interstate commerce system is seeking in the Trans-

portation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. . . . In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce, it deems necessary or desirable. This is because of the supremacy of the national power in this field. . . .

It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.

It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception. So, too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference

between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid federal order as to the intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion.

The order of the District Court granting the interlocutory injunction is

Affirmed.

26. *Dayton-Goose Creek Railway Company* v. *United States*[1]

Mr. Chief Justice Taft delivered the opinion of the court.

The main question in this case is whether the so-called "recapture" paragraphs of the Transportation Act of 1920 . . . are constitutional.

The Dayton-Goose Creek Railway is a corporation of Texas, engaged in intrastate, interstate, and foreign commerce. Its volume of intrastate traffic exceeds that of its interstate and foreign traffic. In response to orders of the Interstate Commerce Commission, the carrier made returns for 10 months of 1920, and for the full year of 1921, reporting the value of its railroad property employed in commerce and its net revenue therefrom. It earned $21,666.24 more than 6 per cent., on the value of its property in the 10 months of 1920, and $33,766.98 excess in the 12 months of 1921. The Commission requested it to report what provision it had made for setting up a fund to preserve one half of these excesses, and to remit the other half to the Commission.

The carrier then filed the present bill, setting forth the constitutional invalidity of the recapture provisions of the act and the orders of the Commission based thereon, averring that it had no adequate remedy at law to save itself from the irreparable wrong about to be done to it by enforcement of the provisions, and praying that the defendants, the United States, the Interstate Commerce Commission, and the United States district attorney for the Eastern District of Texas, be temporarily restrained

[1] Supreme Court of the United States, 1924. 263 United States, 456.

from prosecuting any civil or criminal suit to enforce the Commission's orders and that the court on final hearing make the injunction permanent. . . .

While the Dayton-Goose Creek Railway Company was the sole complainant below and is the sole appellant here, nineteen other railway companies . . . filed briefs in support of its appeal. . . .

By section 422 of the Transportation Act, there was added to the existing Interstate Commerce Act, and its amendments, section 15a. The section in its second paragraph directs the Commission to establish rates which will enable the carriers, as a whole or by rate groups or territories fixed by the Commission, to receive a fair net operating return upon the property they hold in the aggregate for use in transportation. By paragraph 3 the Commission is to establish from time to time and make public, the percentage of the value of the aggregate property it regards as a fair operating return, but for 1920 and 1921 such a fair return is to be 5½ per cent., with discretion in the Commission to add one-half of 1 per cent. as a fund for adding betterments on capital account. By paragraph 4 the Commission is to fix the aggregate value of the property from time to time, using in doing so the results of its valuation of the railways as provided in section 19a of the Interstate Commerce Act so far as they are available and all the elements of value recognized by the law of the land for rate-making purposes, including so far as the Commission may deem it proper, the investment account of the railways.

Paragraph 5 declares that because it is impossible to establish uniform rates upon competitive traffic which will adequately sustain all the carriers needed to do the business, without giving some of them a net income in excess of a fair return, any carrier receiving such excess shall hold it in the manner thereafter prescribed as trustee for the United States. Paragraph 6 distributes the excess, one-half to a reserve fund to be maintained by the carrier, and the other half to a general railroad revolving fund to be maintained by the Commission. Paragraph 7 specifies the only uses to which the carrier may apply

its reserve fund. They are the payment of interest on bonds and other securities, rent for leased lines, and the payment of dividends, to the extent that its operating income for the year is less than 6 per cent. When the reserve fund equals 5 per cent. of the value of the railroad property, and as long as it continues to do so, the carrier's one-half of the excess income may be used by it for any lawful purpose. Under paragraph 10, and subsequent paragraphs, the general railroad revolving fund is to be administered by the Commission in making loans to carriers to meet expenditures on capital account, to refund maturing securities originally issued on capital account and for buying equipment and facilities and leasing or selling them to carriers. . . .

The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

It . . . is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. . . .

Title IV of the Transportation Act, embracing sections 418 and 422, is carefully framed to achieve its expressly declared objects. Uniform rates enjoined for all shippers will tend to divide the business in proper proportion so that when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker roads were permitted to charge higher rates than their competitors, the business would seek the stronger roads with the lower rates, and congestion would follow. The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. Those who earn more must hold the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

First. Rates which as a body enable all the railroads, necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. He with every other shipper similarly situated in the same section is vitally interested in having a system which can do all the business offered. If there is congestion, he suffers with the rest. He may, therefore, properly be required in the rates he pays to share with all other shippers of the same section the burden of maintaining an adequate railway capacity to do their business. This conclusion makes it unnecessary to discuss the question

mooted whether shippers are deprived of constitutional rights when denied reasonable rates.

It should be noted that, in reaching a conclusion upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all. Paragraph 17 of section 15a makes this clear:

"The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section."

This last clause only prevents the shipper from objecting to a particular rate otherwise reasonable, on the ground that the net return from the whole body of rates is in excess of a fair percentage of profit, a circumstance that was never relevant in such an inquiry, as hereafter shown.

Second. The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled as of constitutional right to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends but that his obligation limits him to only fair or reasonable profit. If the company owned the only railroad engaged in transportation in a given section and was doing all the business, this would be clear. If it re-

ceives a fair return on its property, why should it make any difference that other and competing railroads in the same section are permitted to receive higher rates for a service which it costs them more to render and from which they receive no better net return? Classification of railways in the matter of adjustment of rates has been sustained in numerous cases. . . .

Reliance is also had on decisions of this Court in cases where the question was of the reasonableness of state rates, and it was held that evidence to show that the revenue of the carrier from both state and interstate commerce gave a fair profit, was not relevant. The State cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and on the other hand the carrier cannot justify unreasonably high rates on domestic business on the ground that only in that way is it able to meet losses on its interstate business. The Minnesota Rate Cases, 230 U. S. 352, 435; Smyth *v.* Ames, 169 U. S. 466, 541. But this conclusion does make against the use of a fair return of operating profit as a standard of reasonableness of rates when the issue is as to the general level of all the rates received by the carrier.

The reduction of the net operating return provided by the recapture clause is, as near as may be, the same thing as if rates had all been reduced proportionately before collection. It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable, so far as the carrier is concerned, is to reduce its profit to what is fair.

We have been greatly pressed with the argument that

the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation; that the income it receives for the use of its property is as much protected by the Fifth Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property, and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the Government a taking without due process.

It is then objected that the Government has no right to retain one-half of the excess, since, if it does not belong to the carrier, it belongs to the shippers and should be returned to them. If it were valid, it is an objection which the carrier cannot be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid. The rates are reasonable from the standpoint of the shipper as we have shown, though their net product furnishes more than a fair return for the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper, and that for the carrier due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the Government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier. Yet it is made up of payments for service to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties. Indirectly and ultimately this should benefit the shippers by bringing the weaker roads nearer in point of economy and efficiency to the stronger roads and thus making it just and possible to reduce the uniform rates.

The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates invades the reserved power of the States and

is in conflict with the Tenth Amendment. In solving the problem of maintaining the efficiency of an interstate commerce railway system which serves both the States and the Nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. . . . The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates which, if present, is indistinguishable. . . .

It is also said in argument that the value of the carrier's property, upon which the net income was calculated, was too low and was unfair to the carrier. The value of property, it is argued, really depends on the profit to be expected from its use, and should be calculated on the income from rates prevailing when the law was passed which must be presumed to have been reasonable. The true value of the carrier's property would thus be shown to be so much higher than reported that the actual return would not be higher than 6 per cent. of it and there would be no excess.

We do not think that, with the record as it is, such an argument is open to the appellant. It did allege that the values upon which the return was estimated were not the true values, but it did not allege what the true values were. This was not good pleading and did not properly tender the issue on the question of value. Under orders of the Commission, the carrier itself reported the values of its properties for 1920 and 1921, upon which the ex-

cesses of income were calculated. The bill averred that a return of these particular values was required under the orders of the Commission. This statement is not borne out by the orders themselves. They gave the carrier full opportunity to report any other values and to support them by evidence. This it did not do. We cannot consider an issue of fact that was primarily at least committed by the act to the Commission, when the carrier has not invoked the decision of that tribunal.

The decree of the District Court is affirmed.

CHAPTER XI

FEDERAL REGULATION OF TRUSTS

Economic and constitutional history are inseparable. The relation between the development of railroad transportation and increasing exercise of Federal power has been shown. With the rise of other great industrial and commercial organizations public apprehension was aroused. It was felt that such a concentration of economic power in private hands was inherently dangerous to public welfare and that monopoly and its abuses would be the inevitable result. The State could not possibly be an adequate agency of control and the outcome was the passage of the Sherman Anti-Trust Law of 1890. As in the case of the Interstate Commerce Law of 1887, the passage of the act marked only the initiation of a policy. Subsequent judicial decisions, acts of Congress, and administrative rulings contributed to the formation of a great body of rules by which the Federal Government has attempted to suppress abuses and protect the interests of the public. While Congress had ample authority under the commerce clause of the Constitution to pass such a regulatory act as that of 1890, the applicability of the law to specific forms of combination required judicial determination. The decision in United States *v.* E. C. Knight Company was restrictive in character, the Supreme Court declaring that the contracts and acts involved in the acquisition of property in Pennsylvania had not been shown to be in restraint of interstate or foreign commerce. Had the principle laid down in this decision prevailed, the Anti-Trust Law would have been of little effect in controlling the operations of great industrial combinations, whose dangerous possibilities were steadily becoming more apparent.

27. *Definition of Trust* [1]

A trust (industrial monopoly) may be said to exist when a person, corporation, or combination owns or controls enough of the plants producing a certain article to be able for all practical purposes to fix its price. Control over the price is the fundamental test of monopoly; it is its essential and characteristic feature. Just what percentage of the business must be handled by a trust in order that it may be able to determine the price of a given article cannot be stated with precision, yet it seems fairly

[1] Eliot Jones, *The Trust Problem in the United States*, 1. Copyright, 1921, by The Macmillan Company. Reprinted by permission.

certain that as a general rule the production of from 70 to 80 per cent of the national supply, and possibly even less, is quite ample for price control. As was said by Mr. H. O. Havemeyer, long the head of the sugar trust: "It goes without saying that a man who produces 80 per cent of an article can control the price by not producing; the price must advance if he does not produce; and it must decline if he does produce, if he produces more than the market will take." The term trust or industrial monopoly, therefore, is not identical with complete monopoly; for without an exclusive grant of privileges a complete monopoly is not likely to exist, unless it be based upon the sole possession of a limited natural resource.

The concept of industrial monopoly here defined has been clearly described by the Supreme Court of the United States. In National Cotton Oil *v.* Texas, the Court said: "The idea of monopoly is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.' Its dominant thought now is, to quote another, 'the notion of exclusiveness or unity'; in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' It is the power to control prices which makes the inducement of combinations and their profit."

28. *The Sherman Anti-Trust Act* [1]

An Act to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted . . .,

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such

[1] *United States Statutes at Large*, XXVI, 209. July 2, 1890.

combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restrain-

ing order or prohibition as shall be deemed just in the premises.

Sec. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

Sec. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sec. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

29. *United States* v. *E. C. Knight Company* [1]

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

[1] Supreme Court of the United States, 1895. 156 United States, 1.

By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890. . . .

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill.

It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon a citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power. On the other hand, the power of Congress to regulate commerce among the several States is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power

to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. "Commerce, undoubtedly, is traffic," said Chief Justice Marshall, "but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. . . .

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed,

and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce. . . .

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its ex-

tent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to

say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the surrender of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce. . . .

CHAPTER XII

JUDICIAL INTERPRETATION OF ANTI-TRUST ACT

In the Trans-Missouri Freight Association Case two very important questions were decided, whether the Sherman Anti-Trust Law applied to railroads, for whose regulation Congress had already provided, and also whether that law prohibited only those restraints of trade which were unreasonable under the common law. The majority of the court held that railroads were subject to the Anti-Trust Law and that all restraint of trade, reasonable or unreasonable, was prohibited. The decision has been severely criticised by legal authorities inasmuch as the contract made by the carriers would have been "unreasonable" under common law, and the majority opinion further admitted that certain types of contract "might not be included within the letter or spirit of the statute in question." The minority opinion is of special interest in view of subsequent decisions.

30. *United States* v. *Trans-Missouri Freight Association*[1]

[On March 15, 1889, a number of railway companies, engaged in interstate commerce, formed an association, known as the Trans-Missouri Freight Association, the purpose of which was stated to be the establishment and maintenance of reasonable rates, rules and regulations on interstate freight traffic south and west of the Missouri River. . . . The government thereupon brought a suit in equity to have the association dissolved.]

Mr. Justice Peckham delivered the opinion of the court. . . .

Coming to the merits of the suit, there are two important questions which demand our examination. They are, first, whether the above-cited act of Congress (called herein the Trust Act) applies to and covers common carriers by railroad; and, if so, second, Does the agreement set forth in the bill violate any provision of that act?

As to the first question:

The language of the act includes *every* contract, com-

[1] Supreme Court of the United States, 1897. 166 United States, 290.

bination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations. So far as the very terms of the statute go, they apply to any contract of the nature described. A contract, therefore, that is in restraint of trade or commerce is by the strict language of the act prohibited, even though such contract is entered into between competing common carriers by railroad, and only for the purposes of thereby affecting traffic rates for the transportation of persons and property. If such an agreement restrain trade or commerce, it is prohibited by the statute, unless it can be said that an agreement, no matter what its terms, relating only to transportation, cannot restrain trade or commerce. We see no escape from the conclusion that if any agreement of such a nature does restrain it, the agreement is condemned by this act. It cannot be denied that those who are engaged in the transportation of persons or property from one State to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it. The point urged on the defendants' part is that the statute was not really intended to reach that kind of an agreement relating only to traffic rates entered into by competing common carriers by railroad; that it was intended to reach only those who were engaged in the manufacture or sale of articles of commerce, and who by means of trusts, combinations and conspiracies were engaged in affecting the supply or the price or the place of manufacture of such articles. The terms of the act do not bear out such construction. Railroad companies are instruments of commerce, and their business is commerce itself. . . .

But it is maintained that an agreement like the one in question on the part of the railroad companies is authorized by the Commerce Act, which is a special statute applicable only to railroads, and that a construction of

the Trust Act (which is a general act) so as to include within its provisions the case of railroads, carries with it the repeal by implication of so much of the Commerce Act as authorized the agreement. It is added that there is no language in the Trust Act which is sufficiently plain to indicate a purpose to repeal those provisions of the Commerce Act which permit the agreement; that both acts may stand, the special or Commerce Act as relating solely to railroads and their proper regulation and management, while the later and general act will apply to all contracts of the nature therein described, entered into by anyone other than competing common carriers by railroad for the purpose of establishing rates of traffic for transportation. On a line with this reasoning it is said that if Congress had intended to in any manner affect the railroad carrier as governed by the Commerce Act, it would have amended that act directly and in terms, and not have left it as a question of construction to be determined whether so important a change in the commerce statute had been accomplished by the passage of the statute relating to trusts. . . .

It is said that Congress had very different matters in view and very different objects to accomplish in the passage of the act in question; that a number of combinations in the form of trusts and conspiracies in restraint of trade were to be found throughout the country, and that it was impossible for the state governments to successfully cope with them because of their commercial character and of their business extension through the different States of the Union. Among these trusts it was said in Congress were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Barbed Fence Wire Trust, the Sugar Trust, the Cordage Trust, the Cotton Seed Oil Trust, the Whiskey Trust, and many others, and these trusts it was stated had assumed an importance and had acquired a power which were dangerous to the whole country, and that their existence was directly antagonistic to its peace and prosperity. To combinations and conspiracies of this kind it is contended that the act in question was directed, and not to the combinations of competing railroads to

keep up their prices to a reasonable sum for the transportation of persons and property. It is true that many and various trusts were in existence at the time of the passage of the act, and it was probably sought to cover them by the provisions of the act. Many of them had rendered themselves offensive by the manner in which they exercised the great power that combined capital gave them. But a further investigation of "the history of the times" shows also that those trusts were not the only associations controlling a great combination of capital which had caused complaint at the manner in which their business was conducted. There were many and loud complaints from some portions of the public regarding the railroads and the prices they were charging for the service they rendered, and it was alleged that the prices for the transportation of persons and articles of commerce were unduly and improperly enhanced by combinations among the different roads. Whether these complaints were well or ill founded we do not presume at this time and under these circumstances to determine or to discuss. It is simply for the purpose of answering the statement that it was only to trusts of the nature above set forth that this legislation was directed, that the subject of the opinions of the people in regard to the actions of the railroad companies in this particular is referred to. A reference to this history of the times does not, as we think, furnish us with any strong reason for believing that it was only trusts that were in the minds of the members of Congress, and that railroads and their manner of doing business were wholly excluded therefrom. . . .

Second. The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute, that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal"? Is it confined to a contract or combination which is only in unreasonable re-

straint of trade or commerce, or does it include what the language of the act plainly and in terms covers, all contracts of that nature?

We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is "to protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the Federal statute. We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.

It is now with much amplification of argument urged that the statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common-law meaning of the term "contract in restraint of trade" includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this

country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

Proceeding, however, upon the theory that the statute did not mean what its plain language imported, and that it intended in its prohibition to denounce as illegal only those contracts which were in unreasonable restraint of trade, the courts below have made an exhaustive investigation as to the general rules which guide courts in declaring contracts to be void as being in restraint of trade, and therefore against the public policy of the country. In the course of their discussion of that subject they have shown that there has been a gradual though great alteration in the extent of the liberty granted to the vendor of property in agreeing, as part consideration for his sale, not to enter into the same kind of business for a certain time or within a certain territory. So long as the sale was the *bona fide* consideration for the promise, and was not made a mere excuse for an evasion of the rule itself, the later authorities, both in England and in this country, exhibit a strong tendency towards enabling

the parties to make such a contract in relation to the sale of property, including an agreement not to enter into the same kind of business, as they may think proper, and this with the view to granting to a vendor the freest opportunity to obtain the largest consideration for the sale of that which is his own. A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included within the letter or spirit of the statute in question. But we cannot see how the statute can be limited, as it has been by the courts below, without reading into its text an exception which alters the natural meaning of the language used, and that, too, upon a most material point, and where no sufficient reason is shown for believing that such alteration would make the statute more in accord with the intent of the law-making body that enacted it. . . .

The arguments which have been addressed to us against the inclusion of all contracts in restraint of trade, as provided for by the language of the act, have been based upon the alleged presumption that Congress, notwithstanding the language of the act, could not have intended to embrace all contracts, but only such contracts as were in unreasonable restraint of trade. Under these circumstances we are, therefore, asked to hold that the act of Congress excepts contracts which are not in unreasonable restraint of trade, and which only keep rates up to a reasonable price, notwithstanding the language of the act makes no such exception. In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the law-making branch of the government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent, as to permit us to interpolate an exception into the language of the act, and to

thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. Whether that will be the result or not we do not know and cannot predict. These considerations are, however, not for us. If the act ought to be read as contended for by defendants, Congress is the body to amend it and not this court, by a process of judicial legislation wholly unjustifiable. . . .

The conclusion which we have drawn from the examination above made into the question before us is that the Anti-Trust Act applies to railroads, and that it renders illegal all agreements which are in restraint of trade or commerce as we have above defined that expression, and the question then arises whether the agreement before us is of that nature. . . .

Mr. Justice White dissenting: . . .

Is it correct to say that at common law the words "restraint of trade" had a generic signification which embraced all contracts which restrained the freedom of trade, whether reasonable or unreasonable, and, therefore, that all such contracts are within the meaning of the words "every contract in restraint of trade"? I think a brief consideration of the history and development of the law on the subject will not only establish the inaccuracy of this proposition, but also demonstrate that the words "restraint of trade" embrace only contracts which unreasonably restrain trade, and, therefore, that reasonable contracts, although they, in some measure, "restrain trade," are not within the meaning of the words. It is true that in the adjudged cases language may be found referring to contracts in restraint of trade which are valid because reasonable. But this mere form of expression, used not as a definition, does not maintain the contention that such contracts are embraced within the general terms "every contract in restraint of trade." The rudiments of the doctrine of contracts in restraint of trade are found in the common law at a very early date. The first case on the subject is reported in 6 Year Book 5,

2 Hen. V., and is known as Dier's Case. That was an action of damages upon a bond conditioned that the defendant should not practise his trade as a dyer at a particular place during a limited period, and it was held that the contract was illegal. The principle upon which this case was decided was not described as one forbidding contracts in restraint of trade, but was stated to be one by which contracts restricting the liberty of the subject were forbidden. The doctrine declared in that case was applied in subsequent cases in England prior to the case of Mitchel *v.* Reynolds, decided in 1711, and reported in 1 P. Wms. 181. There the distinction between general restraints and partial restraints was first definitely formulated, and it was held that a contract creating a partial restraint was valid, and one creating a general restraint was not. The theory of partial and general restraints established by that case was followed in many decided cases in England, not, however, without the correctness of the difference between the two being in some instances denied and in others questioned, until the matter was set finally at rest by the House of Lords in Nordenfelt *v.* Maxim Nordenfelt Guns & Ammunition Co., reported in (1894) App. Cas. 535. In that case it was held that the distinction between partial and general restraint was an incorrect criterion, but that whether a contract was invalid because in restraint of trade must depend upon whether, on considering all the circumstances, the contract was found to be reasonable or unreasonable. If reasonable, it was not a contract in restraint of trade, and if unreasonable it was.

The decisions of the American courts substantially conform to both the development and ultimate results of the English cases. Whilst the rule of partial and general restraint has been either expressly or impliedly admitted, the exact scope of the distinction between the two has been the subject of discussion and varying adjudication. And although it is accurate to say that in the cases expressions may be found speaking of contracts as being in form, in restraint of trade and yet valid, it results from an analysis of all the American cases, as it does from the

English, that these expressions in no way imply that contracts which were valid because they only partially restrained trade were yet considered as embraced within the definition of contracts in restraint of trade. On the contrary, the reason of the cases, where contracts partially restraining trade were accepted and hence held to be valid, was because they were not contracts in restraint of trade in the legal meaning of those words. . . .

This court has not only recognized and applied the distinction between partial and general restraints, but has also decided that the true test whether a contract be in restraint of trade is not whether in a measure it produces such effect, but whether under all the circumstances it is reasonable. . . .

The theory, then, that the words "restraint of trade" define and embrace all such contracts without reference to whether they are reasonable, amounts substantially to saying that, by the common law and the adjudged American cases, certain classes of contracts were carved out of and excepted from the general rule, and yet were held to remain embraced within the general rule from which they were removed. But the obvious conflict which is shown by this contradictory result to which the contention leads rests, not upon the mere form of statement, but upon the reason of things. This will, I submit, be shown by a very brief analysis of the reasons by which partial restraints were held not to be embraced in contracts in restraint of trade, and by which ultimately all reasonable contracts were likewise decided not to be so embraced. That is to say, that the reasoning by which the exceptions were created conclusively shows the error of contending that the words "contracts in restraint of trade" continued to embrace those reasonable contracts which those words no longer described.

It is perhaps true that the principle by which contracts in restraint of the freedom of the subject or of trade were held to be illegal was first understood to embrace all contracts which in any degree accomplished these results. But as trade developed it came to be understood that if contracts which only partially restrained the freedom of

the subject or of trade were embraced in the rule forbidding contracts in restraint of trade, both the freedom of contract and trade itself would be destroyed. Hence, from the reason of things, arose the distinction that where contracts operated only a partial restraint of the freedom of contract or of trade they were not in contemplation of law contracts in restraint of trade. And it was this conception also which, in its final aspect, led to the knowledge that reason was to be the criterion by which it was to be determined whether a contract which, in some measure, restrained the freedom of contract and of trade, was in reality, when considered in all its aspects, a contract of that character or one which was necessary to the freedom of contract and of trade. To define, then, the words "in restraint of trade" as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade, and therefore nothing to restrain. The dilemma which would necessarily arise from defining the words "contracts in restraint of trade" so as to destroy trade by rendering illegal the contracts upon which trade depends, and yet presupposing that trade would continue and should not be restrained, is shown by an argument advanced, and which has been compelled by the exigency of the premise upon which it is based. Thus, after insisting that the word "every" is all-embracing, it is said from the necessity of things it will not be held to apply to covenants in restraint of trade which are collateral to a sale of property, because not "supposed" to be within the letter or spirit of the statute. But how, I submit, can it be held that the words "*every* contract in restraint of trade" *embrace all* such contracts, and yet at the same time it be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule which is relied on, but it rests upon no foundation of reason. It must either result from the exclusion of particular classes of contracts, whether they be reasonable or not, or it must arise from the fact that the con-

tracts referred to are merely collateral contracts. But many collateral contracts may contain provisions which make them unreasonable. The exception which is relied upon, therefore, as rendering possible the existence of trade to be restrained is either arbitrary or it is unreasonable.

But, admitting *arguendo* the correctness of the proposition by which it is sought to include every contract, however reasonable, within the inhibition of the law, the statute, considered as a whole, shows, I think, the error of the construction placed upon it. Its title is "An Act to protect trade and commerce against unlawful restraints and monopolies." The word "unlawful" clearly distinguishes between contracts in restraint of trade which are lawful and those which are not. In other words, between those which are unreasonably in restraint of trade, and consequently invalid, and those which are reasonable and hence lawful. When, therefore, in the very title of the act the well-settled distinction between lawful and unlawful contracts is broadly marked, how can an interpretation be correct which holds that all contracts, whether lawful or not, are included in its provisions? Whilst it is true that the title of an act cannot be used to destroy the plain import of the language found in its body, yet when a literal interpretation will work out wrong or injury, or where the words of the statute are ambiguous, the title may be resorted to as an instrument of construction. . . .

CHAPTER XIII

JUDICIAL INTERPRETATION OF ANTI-TRUST ACT

(CONTINUED)

As had been the case with railroad regulation, the Supreme Court in the course of applying the Anti-Trust Law receded from some of the positions it had assumed in earlier decisions. In the Northern Securities Case the defendants claimed that the purchase of a controlling interest in the three railroad companies concerned was not a transaction in interstate commerce, did not involve any restraint on the operations or charges of these railroads, and was therefore not within the prohibitions of the Anti-Trust Law. Had the court adhered to the principle laid down in the E. C. Knight Case the transaction would not have been considered illegal. The majority of the justices, however, declared that the arrangement had been entered into for the purpose of monopolizing railroad transportation in the area served by these lines.

In the Standard Oil decision of 1911 the sweeping application of the law set forth in the Trans-Missouri Freight Association decision was greatly modified. While declaring that the great oil company had by its organization and methods shown that it was intended to monopolize the refining and selling of petroleum products, the court proceeded to lay down the principle that the Anti-Trust Law must be construed by the rule of reason. Its terms are not precise. If literally applied it "would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce." The alternative would be non-enforcement because of its uncertainty. The decision in this case marks a turning-point in the history of the relations of the government and private business.

31. *Northern Securities Company* v. *United States* [1]

Mr. Justice Harlan announced the affirmance of the decree of the circuit court, and delivered the following opinion: . . .

Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having com-

[1] Supreme Court of the United States, 1904. 193 United States, 197.

peting and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership*. . . .

The circuit court was undoubtedly right when it said —all the judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." . . .

We will not encumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination, or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce;

That to vitiate a combination such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce

and to deprive the public of the advantages that flow from free competition;

That the constitutional guaranty of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international* commerce; and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question. . . .

Mr. Justice White . . . dissenting.

. . . Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in state corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such questions are to be governed by the definition of commerce just quoted from Gibbons *v.* Ogden. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more,—it is intercourse"; that is, traffic between the States and intercourse between the States. I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the States or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a state corporation, by the most latitudinarian construction, be embraced by the words "commercial intercourse between nations and parts of nations"? And to remove all doubt, the definition points out the meaning of the delegation of power to regulate, since it says that it is to be "regulated by prescribing rules for carrying on that intercourse." Can it in reason be maintained that to prescribe rules governing the ownership of stock within a State, in a corporation created by it, is within the power to prescribe rules for the regulation of intercourse between citizens of different States?

But if the question be looked at with reference to the powers of the Federal and state governments,—the general nature of the one and the local character of the other which it was the purpose of the Constitution to create

and perpetuate,—it seems to me evident that the contention that the authority of the National Government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by state authority, is absolutely destructive of the Tenth Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." This must follow, since the authority of Congress to regulate on the subject can, in reason, alone rest upon the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the States from the beginning if Congress deemed that the rights conferred by such state charters tended to restrain commerce between the States or to create a monopoly concerning the same.

Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of state railroads which may do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the States creating the corporations.

It would likewise overthrow every state law forbidding such consolidations; for if the ownership of stock in state corporations be within the regulating power of Congress under the commerce clause and can be prohibited by Congress, it would be within the power of that body to permit that which it had the right to prohibit. . . .

. . . True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms

of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and ownership of the same property. . . .

The acquiring and ownership by one person or corporation of a majority of the stock in competing railroads engaged in interstate commerce, it is argued, being a direct burden, therefore power to regulate the subject is in Congress, and not in the States. . . .

Where an authority is exerted by a State which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the States if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* . . .

32. *Standard Oil Company* v. *United States* [1]

Mr. Chief Justice White delivered the opinion of the court.

. . . Let us consider the language of the 1st and 2nd sections, guided by the principle that where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.

As to the 1st section, the words to be interpreted are: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal." As there is no room for dispute that the statute was intended to formulate a

[1] Supreme Court of the United States, 1911. 221 United States, 1.

rule for the regulation of interstate and foreign commerce, the question is, What was the rule which it adopted?

In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results:

a. That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

b. That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,—that is, an undue restraint.

c. And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the

prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided.

And a consideration of the text of the second section serves to establish that it was intended to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. The prohibitions of the second embrace "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations." . . . By reference to the terms of section 8 it is certain that the word "person" clearly implies a corporation as well as an individual.

The commerce referred to by the words "any part," construed in the light of the manifest purpose of the statute, has both a geographical and a distributive significance, that is, it includes any portion of the United States and any one of the classes of things forming a part of interstate or foreign commerce.

Undoubtedly, the words "to monopolize" and "monopolize," as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first sec-

tion forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section. And, of course, when the second section is thus harmonized with and made, as it was intended to be, the complement of the first, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve. And it is worthy of observation, as we have previously remarked concerning the common law, that although the statute, by the comprehensiveness of the enumerations embodied in both the first and second sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract. . . .

In substance, the propositions urged by the government are reducible to this: That the language of the statute embraces every contract, combination, etc., in re-

straint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language. The error involved lies in assuming the matter to be decided. This is true, because, as the acts which may come under the classes stated in the first section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint on trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or, if this conclusion were not reached, then the contention would require it to be held that, as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates could be ascertained,—the light of reason,—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the statute, leaves room for but one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but, while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute. . . .

CHAPTER XIV

THE SIXTEENTH AMENDMENT

Expenditures of the Federal Government grew steadily and the scope of its activities even more rapidly. A natural result was consideration of possible new sources of revenue. Tariff and internal revenue taxes were criticised as uncertain in yield and as falling, in the last analysis, on the consumers of the country regardless of their ability to pay. The holders of great private fortunes, it was claimed, escaped any proportionate share of the burden of Federal taxation.

An income tax had been one of the methods used to meet the great outlays necessitated by the Civil War, but it had not been levied since 1872. The decision in the Springer Case in 1880 was generally accepted as settling the long-mooted question whether such a levy was an excise or a direct tax. Under the limitations imposed by the Constitution, direct taxes could only be levied in proportion to the population of the States.

The act of 1894 was therefore merely the renewed exercise of a power already effectively used in meeting the need of increased revenue. The reversal of the Springer decision by the Supreme Court, the justices dividing five to four, was popularly accepted as a great victory for the forces of organized wealth. The natural result was popular agitation for a constitutional amendment which would put the power of Congress to levy such a tax beyond any further question. It was not until 1913 that the Sixteenth Amendment was declared effective. It has worked revolutionary changes in the Federal fiscal system and the revenue laws passed under its authority have brought millions of people for the first time into direct contact with the taxing power of the United States.

In several decisions the Supreme Court has pointed out that the Sixteenth Amendment has not superseded all the older limitations on the taxing power. The phrase "from whatever source derived" does not authorize an all-inclusive levy on income. Securities of States and their subdivisions are exempt from Federal taxation and, being a favorite medium of investment with the holders of great fortunes, there has been some demand that the taxing power of Congress be enlarged by further amendment.

33. *Springer* v. *United States* [1]

Mr. Justice Swayne, after stating the facts, delivered the opinion of the court.

[1] Supreme Court of the United States, 1880. 102 United States, 586.

The central and controlling question in this case is whether the tax which was levied on the income, gains, and profits of the plaintiff in error, as set forth in the record, and by pretended virtue of the acts of Congress and parts of acts therein mentioned, is a direct tax. . . . If it was, not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it, and the proceedings taken under them by the assessor and collector for its imposition and collection, were all void. . . .

Hamilton left behind him a series of legal briefs, and among them one entitled "Carriage tax." . . . This paper was evidently prepared with a view to the Hylton case, in which he appeared as one of the counsel for the United States. In it he says: "What is the distinction between *direct* and *indirect* taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point." There being many carriages in some of the States, and very few in others, he points out the preposterous consequences if such a tax be laid and collected on the principle of apportionment instead of the rule of uniformity. He insists that if the tax there in question was a direct tax, so would be a tax on ships, according to their tonnage. He suggests that the boundary line between direct and indirect taxes be settled by "a species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the *whole property* of individuals or on their *whole* real or personal estate. All else must, of necessity, be considered as indirect taxes."

The tax here in question falls within neither of these categories. It is not a tax on the "whole . . . personal estate" of the individual, but only on his income, gains, and profits during a year, which may have been but a small part of his personal estate, and in most cases would

have been so. This classification lends no support to the argument of the plaintiff in error. . . .

It will thus be seen that whenever the government has imposed a tax which it recognized as a *direct* tax, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: 1. In some of the States slaves were regarded as real estate and, 2. Such, an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the national treasury was the same, whether the slaves were omitted or included. The wishes of the South were, therefore, allowed to prevail. We are not aware that the question of the validity of such a tax was ever presented for adjudication. Slavery having passed away, it cannot hereafter arise. It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.

There are four adjudications by this court to be considered. They have an important, if not a conclusive, application to the case in hand. . . . In Pacific Insurance Co. *v.* Soule (7 Wall. 433), the taxes in question were upon the receipts of such companies from premiums and assessments, and upon all sums made or added, during the year, to their surplus or contingent funds. This court held unanimously that the taxes were not *direct taxes*, and that they were valid. . . . In Scholey *v.* Rew (23 Wall. 331), the tax involved was a succession tax, imposed by the acts of Congress of June 30, 1864, and July 13, 1866. It was held that the tax was not a *direct* tax, and that it was constitutional and valid. In delivering the opinion of the court, Mr. Justice Clifford, after remarking that the tax there in question was not a direct tax, said: "Instead of that, it is plainly an excise tax or duty, authorized by sect. 1, art. 8, of the Constitution, which vests the power in Congress to lay and

collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare." He said further: "Taxes on houses, lands, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category; but it has never been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers the assessment is invalid."

All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error. . . .

Our conclusions are, that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. . . .

34. *Pollock* v. *Farmers' Loan and Trust Company* [1]

[This was a bill filed by Charles Pollock, a citizen of the State of Massachusetts, on behalf of himself and all other stock-holders of the defendant company similarly situated, against the Farmers' Loan and Trust Co., a corporation of the State of New York. The bill alleged that the defendant claimed authority under the provisions of the act of Congress of August 15, 1894, to pay to the United States a tax of two per centum on the net profits of said company, including the income derived from real estate and bonds of the city of New York owned by it. The bill further alleged that such a tax was unconstitutional, null, and void, in that it was a direct tax with respect to the income from real estate, and in that the income from stocks and bonds of the States of the United States and counties and municipalities therein is not subject to the taxing power of Congress. The bill prayed that the provisions known as the income tax incorporated in the act of Congress of August 15, 1894, might be ad-

[1] Supreme Court of the United States, 1895. 158 United States, 601.

judged unconstitutional, null, and void, and that the defendants might be restrained from voluntarily complying with such provisions.]

Mr. Chief Justice Fuller delivered the opinion of the court. . . .

As heretofore stated, the Constitution divided Federal taxation into two great classes, the class of direct taxes and the class of duties, imposts, and excises; and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes apportioned among the several States in proportion to their representation in the popular branch of Congress, a representation based on population as ascertained by the census, was plenary and absolute; but to lay direct taxes without apportionment was forbidden. The power to lay duties, imposts, and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited, was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no further as to the tax on the incomes from real estate than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed, because of want of power to tax the source, and no reference was made to the nature of the tax being direct or indirect.

We are now permitted to broaden the field of inquiry and determine to which of the two great classes a tax upon a person's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks, or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a di-

rect, but an indirect tax, in the meaning of the Constitution. . . .

We know of no reason for holding otherwise than that the words "direct taxes" on the one hand, and "duties, imposts and excises," on the other, were used in the Constitution in their natural and obvious sense, nor, in arriving at what those terms embrace, do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified.

[Here follows a discussion of the views of Hamilton and Madison and of the Hylton case.]

What was decided in the Hylton case was, then, that a tax on carriages was an excise, and, therefore, an indirect tax. The contention of Mr. Madison in the House was only so far disturbed by it, that the court classified it where he himself would have held it constitutional, and he subsequently as President approved a similar act. 3 Stat. 40. The contention of Mr. Hamilton in the Federalist was not disturbed by it in the least. In our judgment, the construction given to the Constitution by the authors of *The Federalist* (the five numbers contributed by Chief Justice Jay related to the danger from foreign force and influence, and to the treaty making power) should not and cannot be disregarded. . . .

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed

so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed." . . .

Nor are we impressed with the contention that, because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it. . . .

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which

it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution. . . .

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each State upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real or personal property and the income of all persons in the State, and collect the same if the State does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Cannot Congress do this as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient, as indeed was done in the act of July 14, 1798 (C. 75, 1 Stat. 597)? Inconveniences might possibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable. . . .

We are not here concerned with the question whether an income tax be or be not desirable, nor whether such a tax would enable the government to diminish taxes on consumption and duties on imports and to enter upon what may be believed to be a reform of its fiscal and com-

mercial system. Questions of that character belong to the controversies of political parties, and cannot be settled by judicial decision. In these cases our province is to determine whether this income tax on the revenue from property does or does not belong to the class of direct taxes. If it does, it is, being unapportioned, in violation of the Constitution, and we must so declare. . . .

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or incomes of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

35. *Amendment XVI* [1]

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

36. *Collector* v. *Day* [2]

Mr. Justice Nelson delivered the opinion of the court. . . .

"If the means and instrumentalities employed by that [the General] Government to carry into operation the powers granted to it, are, necessarily, and, for the sake of

[1] This amendment went into effect February 25, 1913. *United States Statutes at Large*, XXXVII, 1785.

[2] Supreme Court of the United States, 1870. 11 Wallace, 113.

self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

37. *Evans* v. *Gore* [1]

Mr. Justice Van Devanter delivered the opinion of the court. . . .

Let us turn then to the circumstances in which this Amendment was proposed and ratified, and to the controversy it was intended to settle. By the Constitution all direct taxes were required to be apportioned among the several States according to their population, as ascertained by a census or enumeration (art. 1, sec. 2, cl. 3, and sec. 9, cl. 4), but no such requirement was imposed as to other taxes. And apart from capitation taxes, with which we now are not concerned, no rule was given for determining what taxes were direct and therefore to be apportioned, or what were indirect and not within that requirement. Controversy ensued and ultimately centered around the right classification of income from taxable real estate and from investments in taxable personal property. The matter then came before this court in Pollock *v.* Farmers' Loan & Trust Co. . . .; and the decision, when announced, disclosed that the same differences in opinion existing elsewhere were shared by the

[1] Supreme Court of the United States, 1919. 253 United States, 245.

members of the court,—five, the controlling number, regarding a tax on such income as in effect a direct tax on the property from which it arose, and therefore as requiring apportionment, and four regarding it as indirect and not to be apportioned. Much of the law then under consideration had been framed according to the latter view, and because of this and the adjudged inseparability of other portions the entire law was held invalid. Afterwards, to enable Congress to reach all taxable income more conveniently and effectively than would be possible as to much of it if an apportionment among the States were essential, the Sixteenth Amendment was proposed and ratified. In other words, the purpose of the Amendment was to eliminate all occasion for such an apportionment because of the source from which the income came, —a change in no wise affecting the power to tax, but only the mode of exercising it. The message of the President recommending the adoption by Congress of a joint resolution proposing the Amendment, the debates on the resolution by which it was proposed, and the public appeals,—corresponding to those in *The Federalist*,—made to secure its ratification, leave no doubt on this point. And that the proponents of the Amendment, in drafting it, lucidly and aptly expressed this as its object, is shown by its words:

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

True, Governor Hughes, of New York, in a message laying the Amendment before the legislature of that State for ratification or rejection, expressed some apprehension lest it might be construed as extending the taxing power to income not taxable before; but his message promptly brought forth from statesmen who participated in proposing the Amendment such convincing expositions of its purpose, as here stated, that the apprehension was effectively dispelled and ratification followed.

Thus the genesis and words of the Amendment unite in showing that it does not extend the taxing power to

new or excepted subjects, but merely removes all occasion otherwise existing for an apportionment among the States of taxes laid on income, whether derived from one source or another. And we have so held in other cases.

In Brushaber *v.* Union Pacific R. R. Co. 240 U. S. 1, . . . where the purpose and effect of the Amendment were first drawn in question, the chief justice reviewed at length the legislative and judicial action which prompted its adoption, and then, referring to its text, and speaking for a unanimous court, said, pp. 17–18:

"It is clear on the face of this text that it does not purport to confer power to levy income taxes in a generic sense—an authority already possessed and never questioned—or to limit and distinguish between one kind of income taxes and another, but that the whole purpose of the Amendment was to relieve all income taxes when imposed from apportionment from a consideration of the source whence the income was derived. Indeed, in the light of the history which we have given and of the decision in the Pollock Case, and the ground upon which the ruling in that case was based, there is no escape from the conclusion that the Amendment was drawn for the purpose of doing away for the future with the principle upon which the Pollock Case was decided, that is, of determining whether a tax on income was direct, not by a consideration of the burden placed on the taxed income upon which it directly operated, but by taking into view the burden which resulted on the property from which the income was derived, since in express terms the Amendment provides that income taxes, from whatever source the income may be derived, shall not be subject to the regulation of apportionment."

CHAPTER XV

THE FEDERAL POLICE POWER

In a strictly accurate use of constitutional terms, the expression "Federal police power" is inadmissible, inasmuch as the Federal Government is one of delegated powers only. It is used with increasing frequency, however, as a convenient description of the exercise of delegated powers for regulatory or protective purposes where State control has proved inadequate. Both in objects and methods this exercise of Federal authority is essentially that of police jurisdiction.

It has been pointed out in another connection that the States, under our Federal system, retain that great reservoir of public authority, the power to make laws for the protection of the health, safety, morals, and general well-being of their inhabitants. There is no nation-wide concept as to what constitutes public well-being. It is also obvious that moral standards and the efficiency of law enforcement may vary widely among our forty-eight commonwealths. The mail service, interstate carriers, and other agencies of intercourse, however, have nationalized our social and economic life. It is quite conceivable therefore that conditions in a given State may be such as to create a focus of moral infection, or indirectly inflict serious injury on persons far beyond its boundaries. Congress is by no means helpless in such a contingency. The control of the Post-Office, the power to regulate interstate commerce and the power to levy excise taxes are powerful weapons. The heavy hand of Federal authority has been laid on traffickers in lottery tickets, obscene literature, immoral women, adulterated foodstuffs, misbranded goods. The fact that the criminal laws of the United States have usually been more effectively administered than those of the States has not only reconciled people to loss of local jurisdiction but has produced an ever-growing demand for Federal intervention in matters which even the most vehement Federalists of 1800 would never have dreamed to be anything but local in character.

38. *Champion* v. *Ames* [1]

[The plaintiff was held under arrest on a charge of conspiring to commit the offense against the United States of causing to be carried from one State to another in the United States certain lottery tickets for the purpose of disposing of the same to purchasers thereof, in violation

[1] Supreme Court of the United States, 1903. 188 United States, 321.

of the first section of the act of Congress of March 2, 1895, c. 191, entitled, "An act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States." 28 Stat. 963. It was charged that this transportation was attempted to be effected by depositing lottery tickets with the Wells-Fargo Express Company in Texas to be transported by said corporation, engaged in carrying freight and packages through several States and having the same transported to the State of California for the purpose of disposing of the same. Plaintiff instituted proceedings in the Circuit Court of the United States for the Northern District of Illinois to secure his release from arrest by means of a writ of *habeas corpus*, claiming that he was restrained of his liberty by the marshal of the United States in violation of the Constitution and laws of the United States. The application for the writ having been denied, plaintiff appeals.]

Mr. Justice Harlan delivered the opinion of the court.

The appellant insists that the carrying of lottery tickets from one State to another State by an express company engaged in carrying freight and packages from State to State, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, *commerce among* the States within the meaning of the clause of the Constitution of the United States providing that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes"; consequently, that Congress cannot make it an offense to cause such tickets to be carried from one State to another.

The Government insists that express companies, when engaged for hire in the business of transportation from one State to another, are instrumentalities of commerce among the States; that the carrying of lottery tickets from one State to another is commerce which Congress may regulate; and that as a means of executing the power to regulate interstate commerce Congress may make it

an offense against the United States to cause lottery tickets to be carried from one State to another. . . .

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. 28 Stat. 963. That fact is not without significance in view of what this court has said. That act, counsel for the accused well remarks, "was intended to supplement the provisions of prior acts, excluding lottery tickets from the mails, and prohibiting the importation of lottery matter from abroad, and to prohibit the causing lottery tickets to be carried, and lottery tickets and lottery advertisements to be transferred from one State to another by any means or method." 15 Stat. 196; 17 Stat. 302; 19 Stat. 90; Rev. Stat. section 3894; 26 Stat. 465; 28 Stat. 963.

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one State to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*. This view was earnestly pressed at the bar by learned counsel, and must be examined. . . .

If it be said that the act of 1895 is inconsistent with the Tenth Amendment, reserving to the States respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the States has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well

as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge." *In re* Rahrer, 140 U. S. 545, 562. If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one State to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it cannot be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins or, in its discretion, may

prohibit their being transported from one State to another. . . .

It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. . . .

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

39. *McCray* v. *United States* [1]

The United States sued McCray for a statutory penalty of $50, alleging that, being a licensed retail dealer

[1] Supreme Court of the United States, 1903. 195 United States, 29.

in oleomargarine, he had, in violation of the acts of Congress, knowingly purchased for resale a fifty-pound package of oleomargarine, artificially colored to look like butter, to which there were affixed internal revenue stamps at the rate of one-fourth of a cent a pound, upon which the law required stamps at the rate of ten cents per pound. . . .

It was then averred that to impose upon the colored oleomargarine a tax of ten cents per pound would burden it with such a charge as to render it impossible to make and sell it in competition with butter, and therefore the result of imposing a tax of ten cents a pound on oleomargarine when artificially colored would destroy the oleomargarine industry. From these averments it was charged that if the law imposed the tax of ten cents upon the oleomargarine in question, the statute was repugnant to the Constitution, because it deprived the defendant of his property without due process of law; because the levy of such a burden was beyond the constitutional power of Congress, since it was an unwarranted interference by Congress "with the police powers reserved to the several States and to the people of the United States by the Constitution of the United States"; . . . and, finally, because the attempt by Congress to levy a tax at the rate of ten cents a pound arbitrarily discriminated against oleomargarine in favor of butter, to the extent of destroying the oleomargine industry for the benefit of the butter industry, and was, therefore, violative of "those fundamental principles of equality and justice which are inherent in the Constitution of the United States." . . .

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court. . . .

It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.

1. Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect are to

be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not upon the authority conferred by the Constitution, but upon what may be the consequence arising from the exercise of the lawful authority.

Since, as pointed out in all decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise. . . .

2. The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases (Spencer *v.* Merchant) that "The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

3. Whilst undoubtedly both the Fifth and Tenth Amendments qualify, in so far as they are applicable, all the provisions of the Constitution, nothing in those amendments operates to take away the grant of power to tax conferred by the Constitution upon Congress. The contention on this subject rests upon the theory that the purpose and motive of Congress in exercising its undoubted powers may be inquired into by the courts, and

the proposition is therefore disposed of by what has been said on that subject.

The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an excise should be laid. It therefore follows that, in exerting its power, no want of due process of law could possibly result, because that body chose to impose an excise on artificially colored oleomargarine, and not upon natural butter artificially colored. The judicial power may not usurp the functions of the legislative in order to control that branch of the government in the performance of its lawful duties. . . .

But it is urged that artificially colored oleomargarine and artificially colored natural butter are in substance and in effect one and the same thing, and from this it is deduced that to lay an excise tax only on oleomargarine artificially colored, and not on butter so colored, is violative of the due process clause of the Fifth Amendment because, as there is no possible distinction between the two, the act of Congress was a mere arbitrary imposition of an excise on the one article, and not on the other, although essentially of the same class. Conceding, merely for the sake of argument, that the due process clause of the Fifth Amendment would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand. The distinction between natural butter artificially colored, and oleomargarine artificially colored so as to cause it to look like butter, has been pointed out in previous adjudications of this court. . . . Indeed, in the cases referred to, the distinction between the two products was held to be so marked, and the aptitude of oleomargarine when artificially colored, to deceive the public into believing it to be butter, was decided to be so great, that it was held no violation of the due process clause of the Fourteenth Amendment was occasioned by state legislation absolutely forbidding the manufacture, within the State, of oleomargarine arti-

ficially colored. As it has been thus decided that the distinction between the two products is so great as to justify the absolute prohibition of the manufacture of oleomargarine artificially colored, there is no foundation for the proposition that the difference between the two was not sufficient, under the extremest view, to justify a classification distinguishing between them.

4. Lastly we come to consider the argument that, even though as a general rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void, because they violate those fundamental rights which it is the duty of every free government to safeguard, and which, therefore, should be held to be embraced by implied, though none the less potential, guaranties, or, in any event, to be within the protection of the due process clause of the Fifth Amendment.

Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede, for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if, by the perverted exercise of such power, so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, that it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution, by necessary implication, forbade them.

Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public

into buying it for butter is such that the States may, in the exertion of their police powers, without violating the due process clause of the Fourteenth Amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the Fifth Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress. . . .

CHAPTER XVI

THE FEDERAL POLICE POWER

(CONTINUED)

Was the congressional power discussed in the preceding chapter capable of indefinite extension? In the light of numerous decisions, especially such as that in United States *v.* Doremus, the answer seemed to be in the affirmative. The employment of children of tender years in various industries was an admitted evil. It had been an accepted constitutional principle that manufacturing and similar productive processes were not commerce, "and were therefore entirely subject to State jurisdiction." In the matter of child labor, State laws were frequently inadequate, and in some cases where the laws were good their enforcement was not. The abuse was repellent to the humane sentiments of the age and also worked to the injury of industries in the States enforcing higher standards of employment.

Advocates of Federal intervention resorted to Congress and that body responded in 1916 with a law penalizing the shipment of the products of child labor in interstate and foreign commerce. The tremendous force of the opinions of the Supreme Court in developing our constitutional system was never better illustrated. In Hammer *v.* Dagenhart the court held that the goods produced by child labor were themselves harmless and the processes involved in their production a matter for State control. In 1919 Congress enacted another law with the same object in view, this time imposing a ten per cent tax on the net annual income of employers using child labor in mines, mills, and factories. In Bailey *v.* Drexel Furniture Company the Supreme Court declared that the taxing power was not being properly used, and that such use might lead to complete destruction of the reserved powers of the State.

As in the case of the income tax, the next step was to secure a constitutional amendment giving Congress adequate regulatory authority. In June, 1924, an amendment was submitted to the States, its proponents confidently predicting its prompt ratification. The country, however, was awake to the potentialities of words like "regulate," "labor," "persons," if liberally interpreted. Might not Congress attach educational prerequisites in regulating "labor" and so invade the educational field? How far would the power to regulate such "labor" involve interference with "domestic relations" hitherto exclusively under State jurisdiction? On November 2, in an advisory referendum the voters of Massachusetts by a great majority expressed disapproval of the proposed amendment. At the following legislative

sessions, only four States approved, as compared with thirty-nine rejecting it or postponing action. Apparently this extension of Federal authority has been definitely terminated.

40. *United States* v. *Doremus* [1]

[C. T. Doremus was indicted for violating section 2 of the so-called Harrison Narcotic Drug Act of 1914. The District Court of the United States for the Western District of Texas, upon demurrer to the indictment, held the section unconstitutional as an invasion of the police power reserved to the State, and not a revenue measure. The case reached the Supreme Court under the Criminal Appeals Act of 1907. Doremus, a physician, duly registered, had paid the tax required by the first section of the act, but was charged with unlawfully selling to one Ameris a certain quantity of heroin, the sale not being in pursuance of a written order on a form issued on the blank furnished for that purpose by the Commissioner of Internal Revenue. Ameris, furthermore, was a known addict, and the sale, it was charged, was not in the course of professional treatment, but merely to gratify the appetite of an habitual drug user. The statute requires that all persons importing, manufacturing, dispensing, selling, etc., certain specified drugs and their derivatives, shall register with the collector of internal revenue of the district and pay a tax. Buying and selling are governed by minute regulations, records must be kept in accordance with prescribed forms, and severe penalties are provided for violations of the law.]

Mr. Justice Day delivered the opinion of the court. . . .

The only limitation upon the power of Congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation Congress may select the subjects of taxation, and may exercise the power conferred at its discretion. License Tax Cases, 5 Wall. 462, 471. Of course Congress may not in the exercise of federal power exert authority wholly reserved to the States. Many de-

[1] Supreme Court of the United States, 1919. 249 United States, 86.

cisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. . . .

Considering the full power of Congress over excise taxation the decisive question here is: Have the provisions in question any relation to the raising of revenue? That Congress might levy an excise tax upon such dealers, and others who are named in section 1 of the act, cannot be successfully disputed. The provisions of section 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges, an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

We cannot agree with the contention that the provisions of section 2, controlling the disposition of these drugs in the ways described, can have nothing to do with

facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of Congress acting under its constitutional authority to impose excise taxes. It follows that the judgment of the District Court must be reversed.

Reversed.

The Chief Justice dissents because he is of opinion that the court below correctly held the act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States.

Mr. Justice McKenna, and Mr. Justice Van Devanter, and Mr. Justice McReynolds concur in this dissent.

41. *Hammer* v. *Dagenhart* [1]

Mr. Justice Day delivered the opinion of the court. . . .

The attack upon the act rests upon three propositions: First: It is not a regulation of interstate and foreign commerce; second: It contravenes the Tenth Amendment to the Constitution; third: It conflicts with the Fifth Amendment to the Constitution.

The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock p. m., or before the hour of 6 o'clock a. m.?

The power essential to the passage of this act, the government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the States.

[1] Supreme Court of the United States, 1918. 247 United States, 251.

In Gibbons *v.* Ogden, 9 Wheat. 1, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said, "It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed." In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The first of these cases is Champion *v.* Ames, 188 U. S. 321, the so-called Lottery Case, in which it was held that Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. In Hipolite Egg Co. *v.* United States, 220 U. S. 45, this court sustained the power of Congress to pass the Pure Food and Drug Act which prohibited the introduction into the States by means of interstate commerce of impure foods and drugs. In Hoke *v.* United States, 227 U. S. 308, this court sustained the constitutionality of the so-called "White Slave Traffic Act" whereby the transportation of a woman in interstate commerce for the purpose of prostitution was forbidden. . . .

In Caminetti *v.* United States, 242 U. S. 470, we held that Congress might prohibit the transportation of women in interstate commerce for the purposes of debauchery and kindred purposes. In Clark Distilling Co. *v.* Western Maryland Railway Co., 242 U. S. 311, the power of Congress over the transportation of intoxicating liquors was sustained. . . .

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce "consists of intercourse and traffic . . . and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. Delaware, Lackawanna & Western R. R. Co. *v.* Yurkonis, 238 U. S. 439.

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. "When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another State for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another State." (Mr. Justice Jackson *In re* Greene

52 Fed. 113.) This principle has been recognized often in this court. Coe *v.* Errol, 116 U. S. 517, Bacon *v.* Illinois, 227 U. S. 504, and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. Kidd *v.* Pearson, 128 U. S. 1, 21.

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the State of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those States where the local laws do not meet what Congress deems to be the more just standard of other States.

There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some of the States laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such States may be at an economic disadvantage when compared with States which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress.

The grant of power to Congress over the subject of

interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the States have been uniformly recognized as within such control. . . .

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every State in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the State wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; "this principle," declared Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheat. 316, "is universally admitted."

A statute must be judged by its natural and reasonable effect. Collins *v.* New Hampshire, 171 U. S. 30, 33, 34. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. Pipe Line Cases, 234 U. S. 548, 560. The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution.

In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. Lane

County *v.* Oregon, 7 Wall. 71, 76. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. New York *v.* Miln, 11 Pet. 102, 139; Slaughter House Cases, 16 Wall. 36, 63; Kidd *v.* Pearson, *supra.* To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be

Affirmed.

42. *Bailey* v. *Drexel Furniture Company* [1]

Mr. Chief Justice Taft delivered the opinion of the court.

This case presents the question of the constitutional validity of the Child Labor Tax Law. The plaintiff below, the Drexel Furniture Company, is engaged in the manufacture of furniture in the Western district of North Carolina. On September 20, 1921, it received a notice from Bailey, United States collector of internal revenue for the district, that it had been assessed $6,312.79 for having during the taxable year 1919 employed and permitted to work in its factory a boy under 14 years of age, thus incurring the tax of 10 per cent. on its net profits for that year. The company paid the tax under protest, and, after rejection of its claim for a refund, brought this suit. On demurrer to an amended complaint, judgment was entered for the company against the collector for the full amount, with interest. The writ of error is prosecuted by the collector direct from the District Court under section 238 of the Judicial Code (Comp. St. § 1215).

The law is attacked on the ground that it is a regulation of the employment of child labor in the States—an exclusively state function under the Federal Constitution and within the reservations of the Tenth Amendment. It is defended on the ground that it is a mere excise tax levied by the Congress of the United States under its broad power of taxation conferred by section 8, article 1, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by

[1] Supreme Court of the United States, 1922. 259 United States, 20.

the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value, we might not be permitted under previous decisions of this court to infer solely from its heavy burden that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years, and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from this prescribed course of business, he is to pay to the Government one-tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scienters are associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not

intrusted to Congress, but left or committed by the supreme law of the land to the control of the States. We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a co-ordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.

The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion

of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing and imposing its principal consequence on those who transgress its standard. . . .

For the reasons given, we must hold the Child Labor Tax Law invalid and the judgment of the District Court is

Affirmed.

43. *The Child Labor Amendment* [1]

Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

Section 2. The power of the several States is unimpaired by this Article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

[1] *United States Statutes at Large*, XLIII, 670. June 4, 1924.

CHAPTER XVII

THE EIGHTEENTH AMENDMENT

The liquor traffic was originally a matter under the police jurisdiction of the States. Congress levied excise taxes on the production and sale of spirituous and fermented beverages but made no attempt to restrict or otherwise regulate their distribution and consumption. The States were entirely free to suppress the traffic and the Supreme Court had ruled that such action did not constitute a deprivation of property "without due process of law" as forbidden by the Fourteenth Amendment.

Congressional interference first resulted from a demand that States adopting prohibition should be protected against importations from States where production and sale were legal. In the case of Leisy *v.* Hardin, an officer of Keokuk, Iowa, had seized a shipment of beer from Peoria, Ill. The plaintiffs, who were brewers and citizens of Illinois, sold their product only in the original and unbroken packages. Iowa, however, forbade all sales except for medicinal or pharmaceutical purposes by registered pharmacists who were citizens of the State. When the Supreme Court declared the Iowa law unconstitutional as a restraint of interstate commerce, it was apparent that prohibitory laws could be largely nullified by an inexhaustible supply of "original packages" from other States. The Wilson Act of 1890 was passed by Congress in an effort to provide relief. The Supreme Court, however, limited the application of this remedial legislation in Rhodes *v.* Iowa. Prohibition was rapidly spreading among the States, and the Webb-Kenyon Act was passed in response to a renewed demand that the Federal Government use its control of interstate commerce to prevent the flouting of State law. Events moved rapidly after the entry of the United States into the World War. National control of the liquor traffic was felt to be essential if national energies were to be fully utilized in winning the war, a belief which found justification in the fact that European countries where prohibition had never appeared as a moral issue had been obliged to impose drastic restrictions. The Lever Act of 1917 and the War Prohibition Act of 1918 were ostensibly war measures, a striking example of the latent possibilities of the Federal "war power." Before the latter act went into force, the Eighteenth Amendment was ratified. Subsequent attempts to set aside this amendment have thus far proved unsuccessful.

44. *Leisy* v. *Hardin*[1]

Mr. Chief Justice Fuller delivered the opinion of the court.

[1] Supreme Court of the United States, 1890. 135 United States, 100.

. . . That ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control?

In Brown *v.* Maryland [1827] the act of the State legislature drawn in question was held invalid as repugnant to the prohibition of the Constitution upon the States to lay any impost or duty upon imports or exports, and to the clause granting the power to regulate commerce; and it was laid down by the great magistrate who presided over this court for more than a third of a century, that the point of time when the prohibition ceases and the power of the State to tax commences is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; that as to the power to regulate commerce, none of the evils which proceeded from the feebleness of the federal government contributed more to the great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States; that that power

was complete in itself, acknowledged no limitations other than those prescribed by the Constitution, was co-extensive with the subject on which it acts and not to be stopped at the external boundary of a State, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it; and that the principles expounded in the case applied equally to importations from a sister State. Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. . . . In Bowman *v.* Chicago & Northwestern Railway Co., 125 U. S. 465, [1888] section 1553 of the Code of the State of Iowa as amended by c. 143 of the acts of the twentieth General Assembly in 1886, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. . . . It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that where State laws alleged to be regulations of commerce among the States

have been sustained, they were laws which related to bridges or dams across streams, wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one State to another is in its nature national, admitting of but one regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the federal government. . . .

And Mr. Justice Matthews thus proceeds, p. 493: "For the purpose of protecting its people against the evils of intemperance, it [i. e. the State] has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be. . . . Can it be supposed that by omitting any express declaration on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other

article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States." . . .

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. . . .

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in Bowman *v.* Chicago & Northwestern Railway Co., *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual

views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in Gibbons *v.* Ogden, 9 Wheat. 1, 238, in "a frank and candid co-operation for the general good."

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art. 1 of the Constitution of the United States, and therefore the judgment of the Supreme Court of Iowa is

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.

45. *The Wilson Act*[1]

An act to limit the effect of the regulations of commerce between the several States and with foreign countries in certain cases.

[1] *United States Statutes at Large,* XXVI, 313. August 8, 1890.

Be it enacted . . . , That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

46. *Rhodes* v. *Iowa* [1]

Mr. Justice White delivered the opinion of the court. . . . It is not gainsaid that the effect of the act of Congress was to deprive the receiver of goods shipped from another State of all power to sell the same in the State of Iowa in violation of its laws, but whilst it is thus conceded that the act of Congress has allowed the Iowa law to attach to the property when brought into the State before sale, when it otherwise would not have done so until after sale, on the other hand, it is contended that the act of Congress in no way provides that the laws of Iowa should apply before the consummation by delivery of the interstate commerce transaction. To otherwise construe the act of Congress, it is claimed, would cause it to give to the statutes of Iowa extraterritorial operation, and would render the act of Congress repugnant to the Constitution of the United States. It has been settled that the effect of the act of Congress is to allow the statutes of the several States to operate upon packages of imported liquor before sale. . . .

Did the act of Congress referred to operate to attach the legislation of the State of Iowa to the goods in question the moment they reached the State line, and before the completion of the act of transportation, by arriving at the point of consignment and the delivery there to the consignee is then the pivotal question? . . .

[1] Supreme Court of the United States, 1898. 170 United States, 412.

The words "shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory," in one sense might be held to mean arrival at the State line. But to so interpret them would necessitate isolating these words from the entire context of the act, and would compel a construction destructive of other provisions contained therein. But this would violate the fundamental rule requiring that a law be construed as a whole, and not by distorting or magnifying a particular word found in it. It is clearly contemplated that the word "arrival" signified that the goods should actually come into the State, since it is provided that "all fermented, distilled, or other intoxicating liquors or liquids transported into a State or Territory," and this is further accentuated by the other provision, "or remaining therein for use, consumption, sale, or storage therein."

This language makes it impossible in reason to hold that the law intended that the word "arrival" should mean at the State line, since it presupposes the coming of the goods into the State for "use, consumption, sale, or storage." The fair inference from the enumeration of these conditions, which are all-embracing, is that that time when they could arise was made the test by which to determine the period when the operation of the State law should attach to goods brought into the State. But to uphold the meaning of the word "arrival," which is necessary to support the State law, as construed below, forces the conclusion that the act of Congress in question authorized State laws to forbid the bringing into the State at all. This follows from the fact that if arrival means crossing the line, then the act of crossing into the State would be a violation of the State law, and hence necessarily the operation of the law is to forbid crossing the line and to compel remaining beyond the same. Thus, if the construction of the word "arrival" be that which is claimed for it, it must be held that the State statute attached and operated beyond the State line confessedly before the time when it was intended by the act of Congress it should take effect.

But the subtle signification of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which it was its purpose to frustrate. Undoubtedly the purpose of the act was to enable the laws of the several States to control the character of merchandise therein enumerated at an earlier date than would have been otherwise the case; but it is equally unquestionable that the act of Congress manifests no purpose to confer upon the States the power to give their statutes an extraterritorial operation so as to subject persons and property beyond their borders to the restraints of their laws. If the act of Congress be construed as reaching the contract for interstate shipment made in another State, the necessary effect must be to give to the laws of the several States extraterritorial operation, for, as held in the Bowman case, the inevitable consequence of allowing a State law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the State for such shipments. If the construction claimed be upheld, it would be in the power of each State to compel every interstate commerce train to stop before crossing its borders, and discharge its freight, lest by crossing the line it might carry within the State merchandise of the character named covered by the inhibitions of a State statute. . . .

If it had been the intention of the act of Congress to provide for the stoppage at the State line of every interstate commerce contract relating to the merchandise named in the act, such purpose would have been easy of expression. The fact that such power was not conveyed, and that, on the contrary, the language of the statute relates to the receipt of the goods "into any State or Territory for use, consumption, sale, or storage therein," negatives the correctness of the interpretation holding that the receipt into any State or Territory for the purposes named could never take place. Light is thrown

upon the purpose and spirit of the act by another consideration. The Bowman case was decided in 1888, the opinion in Leisy *v.* Hardin was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective States to attach to intoxicating liquors coming into the States by an interstate shipment, only after the consummation of the shipment, but before the sale of the merchandise, —that is, that the one receiving merchandise of the character named should, whilst retaining the full right to use the same, no longer enjoy the right to sell free from the restrictions as to sale created by State legislation, a right which the decision in Leisy *v.* Hardin had just previously declared to exist.

This view gives meaning and effect to the language of the act providing that such merchandise "shall not be exempt therefrom" (legislative power of the State) by reason of being introduced therein in "original packages or otherwise." These words have no place or meaning in the act if its purpose was to attach the power of the State to the goods before the termination of the interstate commerce shipment. The words "original packages" had, at the time of the passage of the act by the decisions of this court, acquired with reference to the construction of the Constitution a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a State by the receiver thereof, although State laws might forbid the sale of merchandise of like character not in such packages. . . .

47. *The Webb-Kenyon Act*[1]

An act divesting intoxicating liquors of their interstate character in certain cases.

Be it enacted. . . . That the shipment or transportation in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicat-

[1] *United States Statutes at Large*, XXXVII, 699. March 1, 1913.

ing liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, is hereby prohibited.

48. *Amendment XVIII* [1]

1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[1] This amendment went into effect January 28, 1919. *United States Statutes at Large*, XXXVIII, 2049.

CHAPTER XVIII

FEDERAL SUBSIDIES TO THE STATES

The States are now receiving subsidies from the Federal Treasury for the support of agricultural colleges, experiment stations, vocational education, highways, militia, maternity and infant welfare work, and several other minor activities. In his budget message of December 8, 1925, President Coolidge pointed out that such subsidies were involving an annual expenditure of almost $110,000,000. The system of Federal aid has grown rapidly in recent years and several additional projects have been strongly advocated in Congress, among them one proposing a great appropriation for educational purposes. The inadequate revenue systems of many States have made it difficult to finance the numerous activities demanded by present-day public opinion. The Federal Government, taxing on a national basis, with the tremendous resources made available by the Sixteenth Amendment at its command, has been called upon to assist in various enterprises alleged to be for the welfare of the nation as a whole. The States, under the system of apportioning funds, frequently receive back a substantial percentage of the money paid within their limits in Federal taxes. In 1924, in eight States, highway subsidies alone amounted to more than forty per cent of the amount collected in internal revenue taxes in those States.

Such subsidies, however, are not unconditional gifts. By accepting them the States must conform to certain requirements laid down in the Federal statutes and admit a degree of supervision and control which would have aroused the wrath of the old State-rights school. From that standpoint, as the following documents will show, this development is of profound constitutional significance.

49. *The Growth of the Subsidy System* [1]

In the last decade the policy of federal aid has gathered great momentum. The state legislatures have had to face a demand for a constantly higher standard of governmental service—for better schools, for better roads, for better protection. At the same time they have been met with an equally insistent demand for no further increase in the burden of taxation. The problem of getting more money without raising tax rates has become acute. State

[1] A. F. Macdonald, *Federal Subsidies to the States*, 2–8 *passim*. Reprinted by permission.

legislatures have searched diligently for new sources of revenue, and one of the most prolific sources they have discovered has been the federal treasury. The general government has been willing to aid the states financially, but only on its own terms. To these terms the states have agreed, and so the federal government has found in its hands a weapon with which it can establish national policies and national standards in fields of activity over which the Constitution has denied it any measure of control. It has not been slow to use that weapon for the purpose of enhancing its power and prestige. . . .

The federal aid policy is constantly growing in importance. Every year the states are offered still larger sums of money if they will permit a larger measure of federal supervision over their local activities. And, almost without exception, they accept. . . .

What does the national government receive in return? For a small portion of this expenditure it receives practically nothing. A few of the earlier acts making annual grants of money and land were passed at a time when the spirit of localism was still strong, and the measure of control given the federal government over these subsidies was small indeed. But for more than nine-tenths of the funds annually granted to the states Congress requires a definite accounting and a large measure of federal supervision and control.

The subsidy system performs an especially useful function in the American plan of government, for it reconciles the liberty of local autonomy with the efficiency of centralized administration. It harmonizes the conflicting interests of nationalism and states' rights, and thereby solves one of the most perplexing problems facing the student of political institutions. It is not easy to determine the proper unit for the administration of public service. Purely local control of national affairs is almost certain to degenerate into the most hopeless confusion. When forty-eight states are left free to legislate on a single subject, the result is usually forty-eight different kinds of legislation, much of it contradictory. On the other hand, highly centralized control tends to become bureau-

cratic and cumbersome, destroying local initiative and local responsibility.

The people of America have been loath to sacrifice the autonomy of the states. Around them are clustered the traditions of free government. But it has become increasingly clear in the last few decades that the states are totally unable to cope with the vast economic and social problems confronting them. Great industrial and labor organizations have far transcended state limits, but state commissions and state laws intended to regulate these organizations have operated only within their own boundaries.

Apparently the only solution has been to transfer more and more power to the general government, and that has been the solution adopted. By interpretation, by tacit agreement, by formal amendment, by the exercise of something akin to the police power of the states—in all these ways the federal government has gradually extended its authority and its influence. Men have not been blind to the evils of excessive centralization, but they have preferred that possibility to the certainty of local anarchy and incompetence.

Recently a policy of federal aid has been adopted to unify the apparently conflicting interests of the nation and the states. Grants of money and land have been made to the states by the general government for more than a century, but only within the last few years have these grants been made the basis of a thoroughgoing system of national supervision and control of state activities. Prior to 1911 the states were left free to do practically as they pleased with the funds they received from the national treasury. Since that date the subsidy laws have vested in the general government large supervisory powers over the expenditure of the federal grants by the states. Moreover, they have paved the way for the enforcement of minimum national standards of efficiency by vesting in federal authorities the right to withhold allotments until federal requirements have been complied with.

National standards have thus been established without the sacrifice of state autonomy. No attempt has been

made to compel every state to adopt uniform plans formulated by bureau chiefs in Washington. Each is permitted to solve its own problems in its own way, with due regard to local conditions and local needs. At the same time each state is given the opportunity of benefiting by the experience of its sister states. The only limitation upon local activity is the requirement of maintaining minimum standards established by the federal authorities. Local interest in the success of each co-operative programme is insured by the additional provision that for every dollar granted by the federal government the state or its subdivisions must appropriate another dollar. The requirement of "matching the federal dollar" has become a regular part of all recent subsidy legislation. . . .

Discerning friends of state autonomy and of centralized administration alike will welcome the further extension of the federal subsidy system, for without such a check upon the centripetal forces of government the states, having demonstrated their complete incapacity to deal with the vast national problems of this era, must eventually be reduced to administrative units. And even the most ardent exponents of the new nationalism must realize that excessive centralization has its dangers. Local initiative combined with effective federal supervision is the solution of the American problem of administration. . . .

50. *A Warning Against Federal Interference* [1]

More and more the federal government is taking over the powers of the state, and our nation is in an headlong rush to centralize all government at Washington.

This is, indeed, a dangerous tendency, and we should guard against every attempt at such centralization.

The federal government proceeds in various ways to acquire this centralization. In some cases under the pretense of regulating interstate commerce, and in other cases under the pretense of establishing post-offices and postal routes, and in still other cases by a species of bribery.

[1] Message of Governor John J. Blaine to the Wisconsin Legislature, January 13, 1921.

The state is helpless against the first two methods mentioned. The third method need not succeed unless the state gives its consent.

The species of bribery to which I refer consists of legislation by the federal government in making an appropriation for some purpose, under condition that the state meet that appropriation with a like amount. Sometimes the objects to be accomplished are in the interests of humanity and for a better security of the nation, while in other cases the object sought to be accomplished is to coerce the less progressive states into adopting certain legislation. Some of the purposes are, no doubt, desirable, but to my mind, in many cases the state might better afford to embark upon the same undertaking independently, and by foregoing the appropriation made by the federal government, actually carry out the same project more economically. I therefore recommend to you that you closely scrutinize every project that is presented under the pretense that the state will receive the bounties of the federal government.

51. *The Sheppard-Towner Act*[1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby authorized to be appropriated annually, out of any money in the Treasury not otherwise appropriated, the sums specified in section 2 of this Act, to be paid to the several States for the purpose of cooperating with them in promoting the welfare and hygiene of maternity and infancy as hereinafter provided.

SEC. 2. For the purpose of carrying out the provisions of this Act, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, for the current fiscal year $480,000, to be equally apportioned among the several States, and for each subsequent year, for the period of five years, $240,000, to be equally apportioned among the several States in the manner here-

[1] An act for the promotion of the welfare and hygiene of maternity and infancy, and for other purposes. *United States Statutes at Large,* XLII, 224. November 23, 1921.

inafter provided: *Provided,* That there is hereby authorized to be appropriated for the use of the States, subject to the provisions of this Act, for the fiscal year ending June 30, 1922, an additional sum of $1,000,000, and annually thereafter, for the period of five years, an additional sum not to exceed $1,000,000: *Provided further,* That the additional appropriations herein authorized shall be apportioned $5,000 to each State and the balance among the States in the proportion which their population bears to the total population of the States of the United States, according to the last preceding United States census: *And provided further,* That no payment out of the additional appropriation herein authorized shall be made in any year to any State until an equal sum has been appropriated for that year by the legislature of such State for the maintenance of the services and facilities provided for in this Act.

SEC. 4. In order to secure the benefits of the appropriations authorized in section 2 of this Act, any State shall, through the legislative authority thereof, accept the provisions of this Act and designate or authorize the creation of a State agency with which the Children's Bureau shall have all necessary powers to co-operate as herein provided in the administration of the provisions of this Act: *Provided,* That in any State having a child-welfare or child-hygiene division in its State agency of health, the said State agency of health shall administer the provisions of this Act through such divisions. If the legislature of any State has not made provision for accepting the provisions of this Act the governor of such State may in so far as he is authorized to do so by the laws of such State accept the provisions of this Act and designate or create a State agency to co-operate with the Children's Bureau until six months after the adjournment of the first regular session of the legislature in such State following the passage of this Act.

SEC. 8. Any State desiring to receive the benefits of this Act shall, by its agency described in section 4, submit to the Children's Bureau detailed plans for carrying out the provisions of this Act within such State, which

plans shall be subject to the approval of the board: *Provided*, That the plans of the States under this Act shall provide that no official, or agent, or representative in carrying out the provisions of this Act shall enter any home or take charge of any child over the objection of the parents, or either of them, or the person standing in loco parentis or having custody of such child. If these plans shall be in conformity with the provisions of this Act and reasonably appropriate and adequate to carry out its purposes they shall be approved by the board and due notice of such approval shall be sent to the State agency by the chief of the Children's Bureau.

SEC. 10. Within sixty days after any appropriation authorized by this Act has been made, and as often thereafter while such appropriation remains unexpended as changed conditions may warrant, the Children's Bureau shall ascertain the amounts that have been appropriated by the legislatures of the several States accepting the provisions of this Act and shall certify to the Secretary of the Treasury the amount to which each State is entitled under the provisions of this Act. Such certificate shall state (1) that the State has, through its legislative authority, accepted the provisions of this Act and designated or authorized the creation of an agency to co-operate with the Children's Bureau, or that the State has otherwise accepted this Act, as provided in section 4 hereof; (2) the fact that the proper agency of the State has submitted to the Children's Bureau detailed plans for carrying out the provisions of this Act, and that such plans have been approved by the board; (3) the amount, if any, that has been appropriated by the legislature of the State for the maintenance of the services and facilities of this Act, as provided in section 2 hereof; and (4) the amount to which the State is entitled under the provisions of this Act. Such certificate, when in conformity with the provisions hereof, shall, until revoked as provided in section 12 hereof, be sufficient authority to the Secretary of the Treasury to make payment to the State in accordance therewith.

SEC. 11. Each State agency co-operating with the

Children's Bureau under this Act shall make such reports concerning its operations and expenditures as shall be prescribed or requested by the bureau. The Children's Bureau may, with the approval of the board, and shall, upon request of a majority of the board, withhold any further certificate provided for in section 10 hereof whenever it shall be determined as to any State that the agency thereof has not properly expended the money paid to it or the moneys herein required to be appropriated by such State for the purposes and in accordance with the provisions of this Act. Such certificate may be withheld until such time or upon such conditions as the Children's Bureau, with the approval of the board, may determine; when so withheld the State agency may appeal to the President of the United States who may either affirm or reverse the action of the Bureau with such directions as he shall consider proper: *Provided*, That before any such certificate shall be withheld from any State, the chairman of the board shall give notice in writing to the authority designated to represent the State, stating specifically wherein said State has failed to comply with the provisions of this Act.

SEC. 12. No portion of any moneys apportioned under this Act for the benefit of the States shall be applied, directly or indirectly, to the purchase, erection, preservation, or repair of any building or buildings or equipment, or for the purchase or rental of any buildings or lands, nor shall any such moneys or moneys required to be appropriated by any State for the purposes and in accordance with the provisions of this Act be used for the payment of any maternity or infancy pension, stipend, or gratuity.

SEC. 14. This Act shall be construed as intending to secure to the various States control of the administration of this Act within their respective States, subject only to the provisions and purposes of this Act.

52. *A State-Rights Protest Against Federal Subsidies* [1]

Whereas the enactment of laws of Congress authorizing appropriations to the several States on condition that similar appropriations be made by the States compels each State to undertake work which it may not wish to undertake or lose its share of the Federal appropriation, in which case it would be compelled to contribute in taxes to the work in other States, of which its people disapprove and from which they derive no benefit; and

Whereas such Federal appropriations are becoming burdensome, amounting to millions of dollars each year, with similar amounts from the States; and

Whereas in practically every case the work thus undertaken properly belongs to the several States and should be done by them without interference or control from a centralized government; and

Whereas it is time to cease centralizing power and authority in the National Government in matters which are primarily of local concern and which can generally be best done under local authority and supervision; and

Whereas there is a demand on the part of the people of Maryland for a return to the fundamental principles of our Government, namely, the performance of State duties and functions by the several States; Therefore be it

Resolved by the General Assembly of Maryland, That the Senate and House of Representatives of the United States in Congress assembled be, and they are hereby, requested and urged to repeal all laws which authorize appropriations to the several States in the form of Federal aid on condition that similar appropriations are made by the respective States; and be it further

Resolved, That all offices, boards, and bureaus created to administer or supervise such appropriations be abolished; and be it further

Resolved, That the Representatives from the State of Maryland in the Senate and House of Representatives of the United States be, and they are hereby, requested

[1] Joint resolution and memorial of the General Assembly of Maryland to Congress, April 9, 1924. *Congressional Record*, 68 Congress, 2 Session, LXVI, 17.

to urge and support the repeal of the above mentioned laws; and be it further

Resolved, That the secretary of the State of Maryland be, and he is hereby, requested to transmit under the great seal of this State a copy of the foregoing resolution and memorial to the President of the United States Senate and the Speaker of the House of Representatives of the United States and each of the Representatives from Maryland in the Senate and House of Representatives of the United States.

53. *Federal Aid in Highway Construction* [1]

. . . Texas has 180,000 miles of public road, enough mileage to encircle the earth seven times. Of this amount, only 18,000 miles, or ten per cent, are designated as State highways. Texas leads all other States in highway building; in amount of Federal aid received for roads, and in the amount of work under construction. Texas has for road building the largest Federal appropriation of any State in the Union, amounting to approximately $32,000,000. This exceeds the allotment to any other State by more than two and one-half million dollars. But Texas has a far greater area to cover with an adequate system of roads than any other State. We have, in the past, despite the defects in and objections to the county unit system of road construction, accomplished much, but we have now reached the point where a competent system, centralizing, standardizing, and financing road construction under the supervision of a State Highway Department, is imperative, if we are to continue to receive Federal aid in the construction of our highways. Under the requirements of the Federal Highway Act of November, 1921, exclusive authority in the construction and maintenance of a State system of highways must be vested in the State if it is to continue to share in the apportionment of Federal funds. Under our present plan, this authority is vested in the various counties. We have until November, 1926, to comply with this particular

[1] Address by Governor Pat M. Neff, at Johnson City, Texas, December 22, 1922. *Speeches by Pat M. Neff, Governor of Texas, Discussing Certain Phases of Contemplated Legislation.* Austin, Texas, 1923.

provision of the Federal Aid Act. We do not have that length of time in which to comply with a second requirement of that act in regard to the maintenance of roads already constructed by Federal aid and county funds under county supervision. Unless the roads are maintained, Federal aid will be withdrawn. Under our present plan of operation, the State is not provided with funds that can be used for the upkeep of these State highways. Therefore the negligence and failure of one county to maintain its Federal aid highways would penalize and unjustly punish other counties that had planned and financed a system of roads. This provision of the Federal act is operative at the present time. It demands immediate consideration. Should one of our numerous counties which has constructed Federal aid roads fail to properly maintain them the entire State would be cut off from Federal aid. In order to meet the requirements of the Federal Government and retain Federal aid for our highways, it is necessary to have some amendments made to our present laws. The centralization of authority in the State Highway Department for the construction, financing, operation and maintenance of our State designated highways is prerequisite to the continuance of Federal financial assistance.

Would it be wise for Texas to exclude herself from the use of these millions of dollars in the form of Federal highway aid? Federal aid has been a great incentive to road building in Texas. It has placed road building upon a more scientific basis. Federal aid is recognized as an established principle of our national government. Texas sends to Washington her quota of taxes. She must continue to do so whether or not she elects to take advantage of Federal aid offered. The road policy of our national government, distributing Federal aid in proportion to the area of the State, operates to return to Texas more than a proportionate share of the national revenue allotted for the building of highways. Under this method of allotment, approximately four out of every five dollars of Federal taxes spent in road construction in Texas are paid by other States. . . .

PART THREE. STRUCTURAL AND FUNCTIONAL CHANGES IN GOVERNMENT

CHAPTER XIX

THE PRESIDENCY

The contested election of 1876 had brought about a dangerous situation. While the people accepted the decision of the Electoral Commission as the best way out of the difficulty, few felt that the solution was altogether satisfactory. Four years later President Garfield was mortally wounded by an assassin and lay for months in a condition of more or less complete disability. Both incidents were forcibly called to the attention of Congress and the country at large in the following message of President Arthur. Congress did make eventually more satisfactory provision for succession to the presidency. It has, however, left untouched the crucial matters which President Arthur stressed. In 1919 the disability of President Wilson once again directed attention to the lack of legislative provision for such an emergency.

The Electoral Count Act cannot make good the fundamental defects of the electoral college. The States, with a single exception, have not provided by law for the final determination of controversies over the appointment of electors. The act could not prevent the recurrence of another crisis like that of 1876. Furthermore, in the presidential campaign of 1924, when there were three important candidates in the field, and there was a possibility that the election might be thrown into the House, it was discovered that the political complexion of the various State delegations was such that a deadlock would probably result. In that case, a Vice-President, a minority candidate elected by the Senate, would have succeeded to the presidential office. The fact that this situation failed to materialize in 1924 does not mean that it may not in some future contest. Nothing short of a complete revision of the electoral procedure by constitutional amendment can rid the country of a clumsy and antiquated system which may some day frustrate the will of the electorate and bring about a crisis too serious for peaceful settlement.

54. *First Annual Message of President Arthur* [1]

I commend these subjects to your favorable consideration.

[1] December 6, 1881. Richardson, *Messages and Papers of the Presidents*, VIII, 65.

The importance of timely legislation with respect to the ascertainment and declaration of the vote for Presidential electors was sharply called to the attention of the people more than four years ago.

It is to be hoped that some well-defined measure may be devised before another national election which will render unnecessary a resort to any expedient of a temporary character for the determination of questions upon contested returns.

Questions which concern the very existence of the Government and the liberties of the people were suggested by the prolonged illness of the late President and his consequent incapacity to perform the functions of his office.

It is provided by the second article of the Constitution, in the fifth clause of its first section, that "in case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President."

What is the intendment of the Constitution in its specification of "inability to discharge the powers and duties of the said office" as one of the contingencies which calls the Vice-President to the exercise of Presidential functions?

Is the inability limited in its nature to long-continued intellectual incapacity, or has it a broader import?

What must be its extent and duration?

How must its existence be established?

Has the President whose inability is the subject of inquiry any voice in determining whether or not it exists, or is the decision of that momentous and delicate question confided to the Vice-President, or is it contemplated by the Constitution that Congress should provide by law precisely what should constitute inability and how and by what tribunal or authority it should be ascertained?

If the inability proves to be temporary in its nature, and during its continuance the Vice-President lawfully exercises the functions of the Executive, by what tenure does he hold his office?

Does he continue as President for the remainder of the four years' term?

Or would the elected President, if his inability should cease in the interval, be empowered to resume his office?

And if, having such lawful authority, he should exercise it, would the Vice-President be thereupon empowered to resume his powers and duties as such?

I cannot doubt that these important questions will receive your early and thoughtful consideration. . . .

55. *The Presidential Succession*

The Act of 1792 [1]

Sec. 9. That in case of the removal, death, resignation, or disability both of the President and Vice-President of the United States, the President of the Senate, *pro tempore*, and, in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being, shall act as President of the United States, until such disability be removed, or until a President be elected.

The Act of 1886 [2]

Be it enacted . . . That in case of the removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Treasury, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior shall act as President until

[1] *United States Statutes at Large*, I, 239. March 1, 1792.
[2] *Ibid.*, XXIV, 1. January 19, 1886.

the disability of the President or Vice-President is removed or a President shall be elected: *provided*, that whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting.

Sec. 2. That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively.

Sec. 3. That sections one hundred and forty-six, one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine, and one hundred and fifty of the Revised Statutes are hereby repealed.

56. *The Electoral Count Act*[1]

Be it enacted, etc., that the electors of each State shall meet and give their votes on the second Monday in January next following their appointment, at such place in each State as the legislature of such State shall direct.

Sec. 2. That if any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the elec-

[1] *United States Statutes at Large*, XXIV, 373. February 3, 1887.

toral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Sec. 3. That it shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State providing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment, under the laws of such State, of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by the preceding section to meet, the same certificate, in triplicate, under the seal of the State; and such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of Government the lists of all persons voted for as President, and of all persons voted for as Vice-President; and Section one hundred and thirty-six of the Revised Statutes is hereby repealed; and if there shall have been any final determination in a State of a controversy or contest, as provided for in Section 2 of this act, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress, thereafter, he shall transmit to the two Houses of

Congress copies in full of each and every such certificate so received theretofore at the State Department.

Sec. 4. That Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of one o'clock in the afternoon, on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate, and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be the certificates of the electoral vote, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and, the votes having been ascertained and counted in the manner and according to the rules in this act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one senator and one member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote

or votes from any State which shall have been regularly given by electors, whose appointment has been lawfully certified to according to Section 3 of this act, from which but one return has been received, shall be rejected; but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in Section 2 of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors, or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in Section 2 of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then and in that case, the votes of the electors whose appointment shall have been certified by the Executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the pre-

siding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

Sec. 5. That while the two Houses shall be in meeting as provided in this act, the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer, except to either House on a motion to withdraw.

Sec. 6. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours, it shall be the duty of the presiding officer of each House to put the main question without further debate.

Sec. 7. . . . Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.

57. *Should the Presidential Electoral System Be Abolished?*[1]

The procedure of the electoral choice from first to last is so complicated that at no point is it free from the possibility of irregularities which may result in the nullifica-

[1] James W. Garner in *The Independent*, January 27, 1910. Reprinted by permission.

tion of the popular will. In the first place, the electors may be prevented by accident from meeting at the State capital and casting their ballots on the day prescribed by law. Thus in 1857 the Wisconsin electors were prevented by a violent snow-storm from assembling at Madison on the day fixed by law, and they met the following day and cast the vote of the State for Fremont. As the vote of Wisconsin was not decisive, a decision of the embarrassing question as to the legality of the vote was avoided, otherwise a very serious and dangerous situation would have confronted the country. It would be quite possible for the entire electoral college of the State to perish in a common disaster or otherwise be prevented by act of God from casting the vote of the State according to the requirement of the Constitution. In this case the vote would have to be thrown out or counted for one of the candidates in violation of the letter of the law. In either case, if it were essential to elect a candidate, the peace and safety of the republic would be imperiled.

So long as the electoral college is retained there will always be the possibility of dual returns from a State, involving contests to be settled by a partisan Congress. An elector may die, or resign, and the State may have made no provision for filling the vacancy. Or an ineligible person may be chosen as an elector and the question of the validity of the State's vote will have to be determined by Congress. This is not merely a theoretical possibility. In the election of 1837 six persons who lacked the constitutional qualifications were chosen as electors and their votes were counted on the theory that the act of a *de facto* officer must be treated as valid. Had the issue of the presidential contest turned upon these votes there is little doubt that serious trouble would have been precipitated. If the electoral return is not authenticated and certified in strict accord with the procedure prescribed by law, it must be rejected, however plain may have been the verdict of the popular vote. When we reflect that the decision of the important question as to the "regularity" of an electoral return is by the act of 1887 conferred upon the two houses of Congress always a par-

tisan body, acting concurrently, we can easily appreciate the opportunity afforded to subserve party ends and defeat the popular will of a State. Sometimes the vote of a State is thrown out upon grounds which seem almost frivolous. Thus in 1873 the electoral vote of Arkansas was rejected by Congress and the State disfranchised because the return certificate bore the seal of the Secretary of State instead of the Great Seal, an article which the State did not happen to possess.

It has been well said that the weakest point in the electoral system is the provision relating to the counting of the votes. So long as the count involved nothing more than a simple process of enumeration and addition, the President of the Senate was permitted to ascertain and declare the result. This was probably in accordance with the intention of the framers of the Constitution, who apparently did not foresee the possibility of irregular, fraudulent or dual returns. But in the course of time the count came to involve the process of canvassing, that is, the determination of what shall be counted. Then Congress asserted its right to be more than a mere witness and assumed the important *rôle* of canvassing authority, notwithstanding the evident intention of the framers to make the choice entirely independent of the legislative department except where the electoral colleges should fail to elect. The act of 1887 provides an elaborate and cumbersome method for settling contests over disputed returns, but according to some high authorities the danger has been intensified rather than diminished. It attempts to place the burden of settling contests where it was probably intended to be, namely, on the States. But in not a single instance, I believe, has any State yet (1910) created a tribunal for determining such contests according to the procedure prescribed by the act. Consequently, Congress, sometimes the two chambers being under the control of different parties, remains still the canvassing authority. In the past it has shown its unfitness for this delicate task by its readiness to subserve party ends in the settlement of election disputes, and we have no reason to believe that it will in the future be any the less free

from the thraldom of party spirit when so great a prize as the presidency is at stake. The provision which disfranchises a State when the two houses, acting separately, are unable to agree upon the "regularity" of a return is enough in itself to condemn the whole electoral scheme, because it involves the sacrifice at the whim of either house of one of the most fundamental of the constitutional rights of the States. . . .

CHAPTER XX

SUSPENSIONS AND REMOVALS FROM FEDERAL OFFICE

During the administration of Andrew Johnson the presidential office had reached its lowest point in dignity and effectiveness. The Tenure of Office Act remained on the statute-book as a relic of that unhappy controversy between the Executive and Legislature. The amending act of 1869 was a partial concession to President Grant's request for the repeal of the original enactment. During the administrations of Presidents Grant, Hayes, Garfield, and Arthur the law fell into a condition of "innocuous desuetude." When a Republican Senate in 1885 undertook to call President Cleveland to account for his suspension of over six hundred officials between inauguration and the first meeting of the Senate in December, the Chief Executive took his stand on the authority conferred by the act of 1869. His reply to the Senate is an admirable plea for the dignity and independence of the presidency as provided by the Constitution and developed by the usages of almost a century. The obnoxious law was repealed March 3, 1887.

58. *An Act Regulating the Tenure of Certain Civil Offices* [1]

Sec. 2. *And be it further enacted,* That when any officer appointed as aforesaid, excepting judges of the United States courts, shall, during a recess of the Senate, be shown, by evidence satisfactory to the President, to be guilty of misconduct in office, or crime, or for any reason shall become incapable or legally disqualified to perform its duties, in such case, and in no other, the President may suspend such officer and designate some suitable person to perform temporarily the duties of such office until the next meeting of the Senate, and until the case shall be acted upon by the Senate . . . ; and in such case it shall be the duty of the President, within twenty days after the first day of such next meeting of the Senate, to report to the Senate such suspension, with the evidence

[1] *United States Statutes at Large,* XIV, 430. March 2, 1867.

and reasons for his action in the case, and the name of the person so designated to perform the duties of such office. And if the Senate shall concur in such suspension and advise and consent to the removal of such officer, they shall so certify to the President, who may thereupon remove such officer, and, by and with the advice and consent of the Senate, appoint another person to such office. But if the Senate shall refuse to concur in such suspension, such officer so suspended shall forthwith resume the functions of his office, and the powers of the person so performing its duties in his stead shall cease, and the official salary and emoluments of such officer shall, during such suspension, belong to the person so performing the duties thereof, and not to the officer so suspended: *Provided, however,* That the President, in case he shall become satisfied that such suspension was made on insufficient grounds, shall be authorized, at any time before reporting such suspension to the Senate as above provided, to revoke such suspension and reinstate such officer in the performance of the duties of his office.

59. *An Act to Amend "An Act Regulating the Tenure of Certain Civil Offices"* [1]

Be it enacted . . . , That the first and second sections of an act entitled "An act regulating the tenure of certain civil offices," passed March two, eighteen hundred and sixty-seven, be, and the same are hereby, repealed; and in lieu of said repealed sections the following are hereby enacted:

That every person holding any civil office to which he has been or hereafter may be appointed by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided.

[1] *Ibid.*, XVI, 6. April 5, 1869.

Sec. 2. *And be it further enacted*, That during any recess of the Senate the President is hereby empowered, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, except judges of the United States courts, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed in his discretion by the designation of another, to perform the duties of such suspended officer in the meantime; and such person so designated shall take the oaths and give the bonds required by law to be taken and given by the suspended officer, and shall, during the time he performs his duties, be entitled to the salary and emoluments of such office, no part of which shall belong to the officer suspended; and it shall be the duty of the President within thirty days after the commencement of each session of the Senate, except for any office which in his opinion ought not to be filled, to nominate persons to fill all vacancies in office which existed at the meeting of the Senate, whether temporarily filled or not, and also in the place of all officers suspended; and if the Senate during such session shall refuse to advise and consent to an appointment in the place of any suspended officer, then, and not otherwise, the President shall nominate another person as soon as practicable to said session of the Senate for said office.

60. *President Cleveland's Message to the Senate* [1]

. . . The report of the Committee on the Judiciary of the Senate lately presented and published, which censures the Attorney-General of the United States for his refusal to transmit certain papers relating to a suspension from office, and which also, if I correctly interpret it, evinces a misapprehension of the position of the Executive upon the question of such suspensions, will, I hope, justify this communication.

This report is predicated upon a resolution of the Senate directed to the Attorney-General and his reply to the same. This resolution was adopted in executive session

[1] March 1, 1886. Richardson, *Messages and Papers of the Presidents*, VIII, 376–381 *passim*.

devoted entirely to business connected with the consideration of nominations for office. It required the Attorney-General "to transmit to the Senate copies of all documents and papers that have been filed in the Department of Justice since the 1st day of January, 1885, in relation to the management and conduct of the office of district attorney of the United States for the southern district of Alabama."

The incumbent of this office on the 1st day of January, 1885, and until the 17th day of July ensuing, was George M. Duskin, who on the day last mentioned was suspended by an Executive order, and John D. Burnett designated to perform the duties of said office. At the time of the passage of the resolution above referred to the nomination of Burnett for said office was pending before the Senate, and all the papers relating to said nomination were before that body for its inspection and information.

In reply to this resolution the Attorney-General, after referring to the fact that the papers relating to the nomination of Burnett had already been sent to the Senate, stated that he was directed by the President to say that——

"The papers and documents which are mentioned in said resolution and still remaining in the custody of this Department, having exclusive reference to the suspension by the President of George M. Duskin, the late incumbent of the office of district attorney for the southern district of Alabama, it is not considered that the public interests will be promoted by a compliance with said resolution and the transmission of the papers and documents therein mentioned to the Senate in executive session."

Upon this resolution and the answer thereto the issue is thus stated by the Committee on the Judiciary at the outset of the report:

"The important question, then, is whether it is within the constitutional competence of either House of Congress to have access to the official papers and documents in the various public offices of the United States created by laws enacted by themselves."

I do not suppose that "the public offices of the United States" are regulated or controlled in their relations to either House of Congress by the fact that they were "created by laws enacted by themselves." It must be that these instrumentalities were created for the benefit of the people and to answer the general purposes of government under the Constitution and the laws, and that they are unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation.

The complaint of the committee that access to official papers in the public offices is denied the Senate is met by the statement that at no time has it been the disposition or the intention of the President or any Department of the executive branch of the Government to withhold from the Senate official documents or papers filed in any of the public offices. While it is by no means conceded that the Senate has the right in any case to review the act of the Executive in removing or suspending a public officer, upon official documents or otherwise, it is considered that documents and papers of that nature should, because they are official, be freely transmitted to the Senate upon its demand, trusting the use of the same for proper and legitimate purposes to the good faith of that body; and though no such paper or document has been specifically demanded in any of the numerous requests and demands made upon the Departments, yet as often as they were found in the public offices they have been furnished in answer to such applications.

The letter of the Attorney-General in response to the resolution of the Senate in the particular case mentioned in the committee's report was written at my suggestion and by my direction. There had been no official papers or documents filed in his Department relating to the case within the period specified in the resolution. The letter was intended, by its description of the papers and documents remaining in the custody of the Department, to convey the idea that they were not official; and it was assumed that the resolution called for information, papers,

and documents of the same character as were required by the requests and demands which preceded it.

Everything that had been written or done on behalf of the Senate from the beginning pointed to all letters and papers of a private and unofficial nature as the objects of search, if they were to be found in the Departments, and provided they had been presented to the Executive with a view to their consideration upon the question of suspension from office.

Against the transmission of such papers and documents I have interposed my advice and direction. This has not been done, as is suggested in the committee's report, upon the assumption on my part that the Attorney-General or any other head of a Department "is the servant of the President, and is to give or withhold copies of documents in his office according to the will of the Executive and not otherwise," but because I regard the papers and documents withheld and addressed to me or intended for my use and action purely unofficial and private, not infrequently confidential, and having reference to the performance of a duty exclusively mine. I consider them in no proper sense as upon the files of the Department, but as deposited there for my convenience, remaining still completely under my control. I suppose if I desired to take them into my custody I might do so with entire propriety, and if I saw fit to destroy them no one could complain. . . .

It will not be denied, I suppose, that the President may suspend a public officer in the entire absence of any papers or documents to aid his official judgment and discretion; and I am quite prepared to avow that the cases are not few in which suspensions from office have depended more upon oral representations made to me by citizens of known good repute and by members of the House of Representatives and Senators of the United States than upon any letters and documents presented for my examination. I have not felt justified in suspecting the veracity, integrity, and patriotism of Senators, or ignoring their representations, because they were not in party affiliation with the majority of their asso-

ciates; and I recall a few suspensions which bear the approval of individual members identified politically with the majority in the Senate.

While, therefore, I am constrained to deny the right of the Senate to the papers and documents described, so far as the right to the same is based upon the claim that they are in any view of the subject official, I am also led unequivocally to dispute the right of the Senate by the aid of any documents whatever, or in any way save through the judicial process of trial on impeachment, to review or reverse the acts of the Executive in the suspension, during the recess of the Senate, of Federal officials.

I believe the power to remove or suspend such officials is vested in the President alone by the Constitution, which in express terms provides that "the executive power shall be vested in a President of the United States of America," and that "he shall take care that the laws be faithfully executed."

The Senate belongs to the legislative branch of the Government. When the Constitution by express provision superadded to its legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people; and this express and special grant of such extraordinary powers, not in any way related to or growing out of general Senatorial duty, and in itself a departure from the general plan of our Government, should be held, under a familiar maxim of construction, to exclude every other right of interference with Executive functions. . . .

Two years after the law of 1867 was passed, and within less than five weeks after the inauguration of a President in political accord with both branches of Congress, the sections of the act regulating suspensions from office during the recess of the Senate were entirely repealed, and in their place were substituted provisions which, instead of limiting the causes of suspension to misconduct, crime, disability, or disqualification, expressly permitted

such suspension by the President "in his discretion," and completely abandoned the requirement obliging him to report to the Senate "the evidence and reasons" for his action. . . .

And so it happens that now after the existence of nearly twenty years of almost innocuous desuetude these laws are brought forth—apparently the repealed as well as the unrepealed—and put in the way of an Executive who is willing, if permitted, to attempt an improvement in the methods of administration. . . .

The requests and demands which by the score have for nearly three months been presented to the different Departments of the Government, whatever may be their form, have but one complexion. They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and Executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office. My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands. . . .

61. *Shurtleff* v. *United States* [1]

[On May 3, 1899, the appellant in this case was removed by the President from the office of general appraiser of merchandise. No cause was assigned for his removal. The contention of the appellant is stated in the opinion of the court.]

Mr. Justice Peckham delivered the opinion of the court.

The office of general appraiser of merchandise was created by the twelfth section of the act of Congress approved June 10, 1890. . . . The material portion of that section reads as follows:

"Sec. 12. That there shall be appointed by the Presi-

[1] Supreme Court of the United States, 1903. 189 United States, 311.

dent by and with the advice and consent of the Senate, nine general appraisers of merchandise. . . . They shall not be engaged in any other business, avocation or employment, and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office." . . .

There is, of course, no doubt of the power of Congress to create such an office as is provided for in the above section. Under the provision that the officer might be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office, we are of opinion that if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and a hearing. Reagan *v.* United States, 182 U. S. 419, 425. . . .

It must be presumed that the President did not make the removal for any cause assigned in the statute, because there was given to the officer no notice or opportunity to defend. The question then arises, can the President exercise the power of removal for any other causes than those mentioned in the statute; in other words, is he restricted to a removal for those causes alone, or can he exercise his general power of removal without such restrictions? . . .

The appellant contends that because the statute specified certain causes for which the officer might be removed, it thereby impliedly excluded and denied the right to remove for any other cause, and that the President was therefore by the statute prohibited from any removal excepting for the causes, or some of them, therein defined. The maxim, *expressio unius est exclusio alterius*, is used as an illustration of the principle upon which the contention is founded. We are of opinion that as thus used the maxim does not justify the contention of the appellant. We regard it as inapplicable to the facts herein. The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by the Constitution or statute. It requires plain language to take it away. Did Congress by the use of language providing for removal for certain

causes thereby provide that the right could only be exercised in the specific causes? If so, see what a difference in the tenure of office is effected as to this office, from that existing generally in this country. The tenure of the judicial officers of the United States is provided for by the Constitution but with that exception no civil officer has ever held office by a life tenure since the foundation of the government. . . .

To construe the statute as contended for by appellant is to give an appraiser of merchandise the right to hold that office during his life or until he shall be found guilty of some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected, by implication, with regard to this particular office. We think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. . . . We can see no reason for such action by Congress with reference to this office or the duties connected with it. . . .

In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient. . . .

It is true that, under this construction, it is possible that officers may be removed for causes unconnected with the proper administration of the office. That is the case with most of the other officers in the government. The only restraint in cases such as this must consist in the responsibility of the President under his oath of office, to so act as shall be for the general benefit and welfare. . . .

CHAPTER XXI

APPOINTMENTS TO FEDERAL OFFICE

The people of the United States were slow to accept the principles that public service requires professional qualifications and that administrative efficiency can only be attained by combining proper qualifications and reasonable security of tenure. President Grant had secured in 1871 congressional authorization for the appointment of a commission to prescribe regulations for admission to the civil service, but this experiment came to an untimely end two years later when the necessary appropriation was withheld. The growth of the Federal services and the bitter partisanship of the decade following imposed intolerable burdens on the Chief Executive. Congress paid little heed to the requests made by Presidents Grant and Hayes, and it was not until the assassination of President Garfield by a disappointed office-seeker directed the attention of the country to the situation created by its own indifference and easy good-nature, that decisive action took place. The original bill "to regulate and improve the Civil Service" was introduced by Senator George H. Pendleton, of Ohio, in 1881. When reported out of the Committee on Civil Service and Retrenchment, it was accompanied by a report which is a trenchant summary of existing methods of appointment. After delay and some amendment the bill finally passed in 1883. The gradual extension of the classified service may be traced in the annual reports of the Civil Service Commission. There are still gaps in the system, and in such matters as the enforcement of laws passed under the Eighteenth Amendment the old scandals have reappeared. In general, however, the country has accepted the principles of civil service reform, and the adoption of such a measure as the Rogers Act of May 24, 1924, putting the foreign service under high professional standards, is of good augury for the future.

62. *Civil Service Reform* [1]

The growth of our country from 350,000 square miles to 4,000,000, the increase of population from 3,000,000 to 50,000,000, the addition of twenty-five States, imperial in size and capabilities, have caused a corresponding development of the machinery and faculties of the government.

[1] *Senate Reports*, No. 576, 47 Congress, 1 Session, May 15, 1882.

In the beginning—even so late as 1801—there were 906 post-offices; now there are 44,848. Then there were 69 custom-houses; now there are 135. Then the revenues were less than $3,000,000; now they are $400,000,000. Then our ministers to foreign countries were 4; now they are 33. Then our consuls were 63; now they are 728. Then less than 1,000 men sufficed to administer the government; now more than 100,000 are needed. Then one man might personally know, appoint on their merits, supervise the performance of their duties, and for sufficient cause remove all the officers; now, no single human being, however great his intelligence, discrimination, industry, endurance, devotion, even if relieved of every other duty, can possibly, unaided, select and retain in official station those best fitted to discharge the many and varied and delicate functions of the government. . . .

To the enormous and varied increase of duties and responsibilities arising out of the exigencies of the ever-expanding governmental action, there is added an element of embarrassment and complicated labor not dreamed of by those who framed the government. Political considerations have come to play the most important part in the distribution of the vast patronage. It boots not to consider the origin of the evil, or the responsibility of one party more than another. The fact is confessed by all observers and commended by some that "to the victors belong the spoils"; that with each new administration comes the business of distributing patronage among its friends.

It has come to pass that the work of paying political debts and discharging political obligations, of rewarding personal friends and punishing personal foes, is the first to confront each President on assuming the duties of his office, and is ever present with him even to the last moment of his official term, giving him no rest and little time for the transaction of any other business, or for the study of any higher or grander problems of statesmanship. He is compelled to give daily audience to those who personally seek place, or to the army of those who back them. He is to do what some predecessor of his has left undone,

or to undo what others before him have done; to put this man up and that man down, as the system of political rewards and punishments shall seem to him to demand. Instead of the study of great questions of statesmanship, of broad and comprehensive administrative policy, either as it may concern this particular country at home, or the relations of this great nation to the other nations of the earth, he must devote himself to the petty business of weighing in the balance the political considerations that shall determine the claim of this friend or that political supporter to the possession of some office of profit or honor under him. . . .

The Executive Mansion is besieged, if not sacked, and its corridors and chambers are crowded each day with the ever-changing, but never-ending, throng. Every Chief Magistrate, since the evil has grown to its present proportions, has cried out for deliverance. Physical endurance, even, is taxed beyond its power. More than one President is believed to have lost his life from this cause. . . .

The malign influence of political domination in appointments to office is wide-spread, and reaches out from the President himself to all possible means of approach to the appointing power. It poisons the very air we breathe. No Congressman in accord with the dispenser of power can wholly escape it. It is ever present. When he awakes in the morning it is at his door, and when he retires at night it haunts his chamber. It goes before him, it follows after him, and it meets him on the way. It levies contributions on all the relationships of a Congressman's life, summons kinship and friendship and interest to its aid, and imposes upon him a work which is never finished and from which there is no release. Time is consumed, strength is exhausted, the mind is absorbed, and the vital forces of the legislator, mental as well as physical, are spent in the never-ending struggle for offices.

It has come to be a wide-spread belief that the public service is a charitable institution, furnishing employment to the needy and a home to those adrift. Employment is sought of the government because it cannot be found elsewhere, and to escape actual want. The number of

those who thus crowd all avenues of approach to places in the public service is constantly on the increase. and is daily becoming more importunate. . . .

It is conceded that the party in power must fill the higher official places, who fairly represent its principles and policy, and subject to whose legal instructions the whole subordinate administration is to be carried on. But the subordinates in the executive departments, whose duty is the same under every administration, should be selected with sole reference to their character and their capacity for doing the public work. This latter class includes nearly all of the vast numbers of appointed officials who carry into effect the orders of the Executive or heads of departments, whether at Washington or elsewhere.

The provisions of this bill do not apply to officers elected by the people, or to officers appointed by the President and confirmed by the Senate, or to officers of the Army or Navy, or of the judiciary, or to officers in the post-offices or custom-houses, where the number of clerks does not exceed fifty, or to laborers. They do not apply to those officers who may exercise political power and dictate policies, whose efficient co-operation may be essential in carrying into effect the theories or policies of parties.

They apply only to that immense body of subordinate officials, clerical and administrative, whose duties under every administration would be the same, who could not under any circumstances, in the proper exercise of their functions, affect in the slightest degree the political programme of the party in power. They apply only to that body of "inferior officers," whose appointment may, by the terms of the Constitution, be vested in the President alone, in the courts of law, or the heads of departments. They do not apply to any of this class who are now in office, except in the case of promotion. All present incumbents are left undisturbed until their term of office shall expire or they shall be removed.

This bill does not touch the questions of tenure of office, or removals from office, except that removals shall not be made for refusing to pay political assessments or

to perform partisan service. It leaves both where it finds them.

The single, simple, fundamental, pivotal idea of the whole bill is, that whenever, hereafter, a new appointment or a promotion shall be made in the subordinate civil service in the departments or larger offices, such appointment or promotion shall be given to the man who is best fitted to discharge the duties of the position, and that such fitness shall be ascertained by open, fair, honest, impartial, competitive examination. The impartiality of these examinations is to be secured by every possible safeguard. They are to be open to all who choose to present themselves. . . .

63. *An Act to Regulate and Improve the Civil Service of the United States* [1]

Be it enacted. . . . That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.

The President may remove any commissioner; and any vacancy in the position of commissioner shall be so filled by the President, by and with the advice and consent of the Senate, as to conform to said conditions for the first selection of commissioners.

The commissioners shall each receive a salary of three thousand five hundred dollars a year. And each of said commissioners shall be paid his necessary travelling expenses incurred in the discharge of his duty as a commissioner.

Sec. 2. That it shall be the duty of said commissioners:

First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall

[1] *United States Statutes at Large*, XXII, 403. January 16, 1883.

be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

SECOND. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the officers, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Third, appointments to the public service aforesaid in tne departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place.

Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

Seventh, there shall be non-competitive examinations

in all proper cases before the commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the commissioners as to the manner of giving notice.

Eighth, that notice shall be given in writing by the appointing power to said commission of the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said commission.

And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the commission.

THIRD. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same; and said commission shall keep minutes of its own proceedings.

FOURTH. Said commission may make investigations concerning the facts, and may report upon all matters touching the enforcement and effects of said rules and regulations, and concerning the action of any examiner or board of examiners hereinafter provided for, and its own subordinates, and those in the public service, in respect to the execution of this act.

FIFTH. Said commission shall make an annual report to the President for transmission to Congress, showing its own action, the rules and regulations and the exceptions thereto in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishment of the purposes of this act. . . .

Sec. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or

that may be arranged hereunder pursuant to said rules, until he has passed an examination; or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.

Sec. 8. That no person habitually using intoxicating beverages to excess shall be appointed to, or retained in, any office, appointment, or employment to which the provisions of this act are applicable.

Sec. 9. That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades.

Sec. 10. That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or member of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

Sec. 11. That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving,

any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.

Sec. 12. That no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in this act, or in any navy-yard, fort, or arsenal, solicit in any manner whatever, or receive any contribution of money or any other thing of value for any political purpose whatever.

Sec. 13. No officer or employee of the United States mentioned in this act shall discharge, or promote, or degrade, or in manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

Sec. 14. That no officer, clerk, or other person in the service of the United States shall directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of the House of Representatives, or Territorial Delegate, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

Sec. 15. That any person who shall be guilty of violating any provision of the four foregoing sections shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, or by imprisonment for a term not exceeding three years, or by such fine and imprisonment both, in the discretion of the court.

64. *The Courtesy of the Senate* [1]

One of my last acts as Secretary was to advise the President to nominate a Mr. Hitchcock for collector of

[1] G. S. Boutwell, *Reminiscences of Sixty Years in Public Affairs*, II, 282. Reprinted by permission of The S. S. McClure Company.

the port of San Diego, California. Hitchcock was a lawyer by profession, a graduate of Harvard and a man of good standing in San Diego. Mr. Houghton, the member for the San Diego district, had recommended a man who was a saloon-keeper and a Democrat in politics, but he had supported Houghton in the canvass. Houghton's request was supported by Senator Sargent. Upon the facts as then understood the President nominated Hitchcock and one of the first questions of interest to me was the action of the Senate upon the nomination of Hitchcock which I supported. Sargent appealed to what was known as the courtesy of the Senate, a rule or custom which required Senators of the same party to follow the lead of Senators in the matter of nominations from the respective States. To this rule I objected. I refused to recognize it, and I said I would never appeal to the "courtesy" of the Senate in any matter concerning the State of Massachusetts. Hitchcock was rejected. The President nominated Houghton's candidate.

65. *Appointments in the Unclassified Service* [1]

Speaking of this necessity of the President's reliance on the recommendations of members of Congress, President Taft said: "A member of a community remote from the capital . . . wonders that a President, with high ideals and professions of a desire to keep the government pure and have efficient public servants, can appoint to an important local office a man of mediocre talent and of no particular prominence or standing or character in the community. Of course the President cannot make himself aware of just what standing the official appointed has. He cannot visit the district; he cannot determine by personal examination the fitness of the appointee. He must depend upon the recommendations of others; and in matters of recommendations, as indeed of obtaining office, it is leg muscle and lack of modesty which win, rather than fitness and character. The President has assistance in making his selection, furnished by the Con-

[1] W. H. Taft, *Four Aspects of Civic Duty*, 98. Reprinted by permission of Charles Scribner's Sons, New York City.

gressmen and Senators from the locality in which the office is to be filled; and he is naturally quite dependent on such advice and recommendation. He is made more dependent on this because the Senate, by the Constitution, shares with him the appointing power; practically because of the knowledge of the Senators of the locality, the appointing power is in effect in their hands subject only to a veto by the President."

CHAPTER XXII

ADMINISTRATIVE DETERMINATIONS

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." So runs the Massachusetts Bill of Rights, and the principles therein stated have been accepted as fundamental to the maintenance of free institutions.

The establishment of countless administrative agencies, Federal and State, regulating everything from the national transportation system to the qualifications of barbers and chiropodists has brought about a considerable modification of our older theories. In carrying on their regulatory functions administrative officers, boards, and commissions must be continually exercising powers which are quasi-judicial in character, and in such exercise of power personal judgments are bound to play an important part. Unlimited review by the courts whenever a decision is rendered would soon make a farce of any regulatory effort. The broad power recognized by the Supreme Court as properly exercisable by the Interstate Commerce Commission has already been mentioned. There are, of course, wide variations in the decisions of both Federal and State courts in particular instances, which make it unsafe to generalize as to the finality of administrative determination. Administrative officers, boards, and commissions must confine their functions to the scope authorized by law. They must follow strictly the procedure prescribed by such law. The party adversely affected may appeal to the courts on the ground that the terms of the law have not been observed, or that there has been a denial of "due process of law" as guaranteed by constitutional provisions. The following articles will indicate, however, how great is the power lodged in administrative authorities. Furthermore, under our lack of a scientifically and logically planned administrative service, decisions are rendered in some cases by boards, where the matter is likely to have the benefit of different view-points and debate; in other cases by single officials. Mr. Hoover, Secretary of Commerce, has said of the latter: "No individual should be at the same time legislator, policeman, prosecutor, judge, and jury. . . . The dangers of oppression in these matters are not merely a theory, they are a fact."

66. *Public Clearing-House* v. *Coyne* [1]

Mr. Justice Brown delivered the opinion of the court.

By section 3929 of the Revised Statutes . . . , as amended by the act of September 19, 1890 . . . "The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations or promises, instruct postmasters at any post-office at which *registered* letters arrive directed to any such person or company . . . to return all such registered letters to the postmaster at the office at which they were originally mailed, with the word 'Fraudulent' plainly written or stamped upon the outside thereof."

By section 4041, the Postmaster General is authorized in similar terms to forbid the payment by any postmaster of any postal money order drawn in favor of any person engaged in the prohibited business; and by section 4 of the act of March 2, 1895 . . . , the power thus conferred upon the Postmaster General by the preceding section 3929, is extended and made applicable to *all* letters or other matter sent by mail. . . .

We find no difficulty in sustaining the constitutionality of these sections. The postal service is by no means an indispensable adjunct to a civil government, and for hundreds, if not for thousands, of years the transmission of private letters was either intrusted to the hands of friends or to private enterprise. Indeed, it is only within the last three hundred years that governments have undertaken the work of transmitting intelligence as a branch of their general administration. While it has been known in this country since colonial times and was recognized in the Constitution and in some of the earliest acts of Congress, the rates of postage were so high, and the

[1] Supreme Court of the United States, 1904. 194 United States, 497.

methods of transmission so slow and uncertain, that it was not until 1845, when the postage was reduced to 5 and 10 cents, according to the distance, and a stamp or stamps introduced, that it assumed anything of the importance that it now possesses.

It is not, however, a necessary part of the civil government in the same sense in which the protection of life, liberty and property, the defense of the government against insurrection and foreign invasion, and the administration of public justice are; but is a public function, assumed and established by Congress for the general welfare, and in most countries its expenses are paid solely by the persons making use of its facilities; and it returns, or is presumed to return, a revenue to the government, and really operates as a popular and efficient method of taxation. Indeed, this seems to have been originally the purpose of Congress. The legislative body, in thus establishing a postal service, may annex such conditions to it as it chooses. . . .

It is contended, however, that the laws in question are unconstitutional in that they authorize the Postmaster General to seize and return to sender all letters addressed to a particular person, firm, or corporation which he is satisfied is making use of the mail for an illegal purpose. . . .

It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness.

. . . That due process of law does not necessarily require the interference of the judicial power is laid down in many cases and by many eminent writers upon the subject of constitutional limitations. . . . As was said

by Judge Cooley, in Weimer *v.* Bunbury, 30 Mich. 201: "There is nothing in these words (due process of law), however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress." If the ordinary daily transactions of the departments, which involve an interference with private rights, were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of the government. Even in the recent case of the School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94, the constitutionality of the law authorizing seizures of this kind by the Postmaster General was assumed, if not actually decided, the only reservation being that the person injured may apply to the courts for redress in case the Postmaster General has exceeded his authority, or his action is palpably wrong. . . . Inasmuch as the action of the postmaster in seizing letters and returning them to the writers is subject to revision by the judicial department of the government in cases where the Postmaster General has exceeded his authority under the statute . . . , we think it within the power of Congress to intrust him with the power of seizing and detaining letters upon evidence satisfactory to himself, and that his action will not be reviewed by the court in doubtful cases. . . .

67. *Administrative Decisions in Connection with Immigration*[1]

The federal laws for regulating immigration, out of which this class of administrative decisions has developed, were administered at the beginning by state officials. That method continued nine years after Congress had

[1] Louis F. Post, in *American Political Science Review*, May, 1916. Reprinted by permission.

made permanent appropriations for defraying the expense, exclusive federal jurisdiction not having been established until 1891. Under the secretary of the treasury from that year until 1903 and under the department of commerce and labor from 1903 until 1913, the immigration laws have been administered under the department of labor since March 4, 1913.

Of those laws there are two classes. One class, immigration laws distinctively, relates to all aliens; the other, the Chinese exclusion laws, relates to Chinese alone. To facilitate administration, ports of entry are established at convenient places. Aliens entering elsewhere are subject to deportation, and at the ports of entry immigrant inspectors are stationed to investigate questions of admissibility.

By amendment and interpretation the immigration laws have become alien laws, alienage rather than migration being the major fact in administrative decisions under them. An alien who lives in the United States, no matter how long his residence here may have continued, must have a care if he goes near the Canadian or the Mexican boundary line lest he stub his toe against it and fall over to the other side. His stepping back at the place where he fell, this not being an authorized port, would constitute an unlawful entry and subject him if captured to deportation to the country whence he had originally come. So would his proving to be inadmissible if he applied at an authorized port. A plea that he was not an immigrant because already domiciled here, would be unavailing. His alienage would be the decisive fact. He might have lived in this country almost a lifetime; the country of his original migration might be half way around the world; he might have no friends or relatives there; all his personal associates, property interests and family ties might be here. Yet by administrative decision he could be, in many cases he must be, kept away or sent away; and if sent away, sent not to Mexico or Canada, whose boundary line had tripped him up (for they might refuse to receive him), but possibly to a distant country to which he had become from long absence

a total stranger. To put the example in another way, an alien who lives in the United States, regardless of how long, must have a care if in order to get a particular view of Niagara Falls he is tempted to cross temporarily over to the Canadian side. Should he yield to this temptation his return to the country of his domicile, though it were made within the day or even the very hour, and whether regularly at a port of entry or clandestinely, would be subject to the exclusion provisions of our immigration laws. The supreme court of the United States has so decided.

When an alien appears at an immigration port of entry, he is primarily inspected by public health surgeons and immigrant inspectors as to his admissibility. If they approve him they thereby make an administrative decision in his favor and he is allowed at once to enter the United States. So far as "exclusion" proceedings in contradistinction to possible "expulsion" proceedings in the future are concerned, their decision is final. If the inspectors do not approve the applicant at their primary inspection of him, he is taken before a board of three inspectors where an administrative trial of his case is had. The trial is privately conducted, but the proceedings are recorded. Should this board admit him by unanimous vote, they thereby make an administrative decision which is also final. The alien is in that event forthwith released. Should the decision not be unanimous, the minority member of the board may appeal to the secretary of labor. So may the alien if the decision is against him, whether it be by majority or unanimously.

Appeals go up to the secretary of labor upon the record made by the inspectors. His decisions either way are final, for the courts interfere only in cases in which he appears to them to have no jurisdiction. They may reverse or affirm his decisions on questions of law, but into questions of fact they do not inquire if there is any evidence at all in support of the secretary's conclusion.

Not to all kinds of cases, however, do rights of appeal from immigrant inspectors to the secretary of labor attach. When official surgeons certify to mental defects or

to dangerous or loathsome contagious diseases, and a board of inspectors excludes upon the basis of that certificate, there can be no appeal to anybody. Such cases are beyond the reach even of the secretary of labor.

And in cases in which an appeal does lie to the secretary of labor, or which otherwise come within his authority, the range for discretion is narrow indeed. There is in the whole system no chancery principle enabling him or anyone else to modify any intolerable harshness which the immigration law, by reason of its necessary universality, compels its administrators to inflict. It is true that the secretary of labor is invested with some discretion as to some classes of aliens ordered excluded as likely to become a public charge, and with reference also to admission to hospital treatment for some kinds of physical affliction; but there his discretion is about exhausted. In cases in which the law commands him to dismiss an appeal upon the evidence in the inspectors' record, and in those in which there is no appeal, the law makes him powerless to relieve any consequent suffering however extreme. . . .

But what of the possibilities of excluding citizens by administrative decision?

Ought questions of American citizenship to be determined as incidents of executive administration? Whether they ought to be or not, they are in fact so determined. By administrative decisions, wholly nonjudicial in character, made as an incident to executive routine and with no right reserved for judicial trial or review, citizenship is awarded or denied much as a new public building may be contracted for or an old one ordered to be torn down. It is an executive act performed in the course of executive routine and under the influence of administrative precedents and habits of thought.

Such decisions usually occur in Chinese cases. Immigrants from China are subject to all the disabilities of the ordinary immigration laws and in addition to those also of the Chinese exclusion laws. Originally only Chinese laborers were excluded for being Chinese. This was in accordance with a treaty which authorizes the exclusion

of laborers from China under certain circumstances. By accumulated legislation, however, and departmental interpretations over a long period, the treaty has been thrust so far into the background that outside of a few specific classes all Chinese aliens are now inadmissible. But Chinese born in the United States and under its jurisdiction constitute a class apart.

Pursuant to the Fourteenth Amendment they are constitutional citizens. Consequently every person of Chinese lineage who comes from abroad and claims American birth raises the highest question of privilege known to the laws of our land. Yet his constitutional rights in this respect are determined by administrative decisions —in the first instance by a board of immigrant inspectors and then by the secretary of labor or one of his subordinates upon appeal. The courts will not give judicial consideration to this claim to citizenship farther than it will to the questions of an alien's admissibility. Beyond ascertaining whether there is in the record any evidence at all upon which to base an administrative judgment against citizenship, they refuse to review the secretary's decision.

It may be said that only Chinese are concerned with this, and that they, though born in this country, retain Chinese customs and language exclusively and yield allegiance to China. A serious consideration that, with reference to Chinese-Americanism; but it is quite apart from the question of subordinating constitutional citizenship to administrative decisions. The function of administrative decisions is to execute details of public policy. Private rights, certainly fundamental private rights, belong in another category.

Nor is it true that administrative decisions determining citizenship concern Chinese alone. In principle they apply to every person of American birth whatever his race. As our immigration laws now stand, a direct American descendant of a Pilgrim Father, were he returning from a visit abroad and suffering from tuberculosis or trachoma, from insanity or imbecility, with ringworm of the nail or valvular disease of the heart that might affect

his ability to earn a living, would have his citizenship determined by administrative decision. Had he been abroad long enough to have acquired an alien accent or a foreign air, the decision might be against his citizenship; and in that case it would be final, no matter how weighty the preponderance of proof in his favor. Upon any old-fashioned judge coming to the relief of this citizen who had found himself unable to satisfy the secretary of labor of his American birth, the precedents furnished by Chinese cases would fall like an avalanche. . . .

68. *United States* v. *Ju Toy* [1]

Mr. Justice Holmes delivered the opinion of the court. . . . In a *habeas corpus* proceeding in a District Court of the United States instituted in behalf of a person of Chinese descent being held for return to China by the steamship company which recently brought him therefrom to a port of the United States and who applied for admission therein on the ground that he was a native born citizen thereof but who, after a hearing, the lawfully designated immigration officers found was not born therein and to whom they denied admission,—which finding and denial, upon appeal to the Secretary of Commerce and Labor was affirmed—should the court treat the finding and the action of such executive officers upon the question of citizenship and other questions of fact as having been made by a tribunal authorized to decide the same and as final and conclusive unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them or in some other way in hearing and determining the same committed prejudicial error? . . . The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive. . . .

In the Japanese Immigrant Case, Yamataya *v.* Fisher 189 U. S. 87, it was said: "That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes

[1] Supreme Court of the United States, 1905. 198 United States, 253.

of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions and regulations exclusively to executive officers without judicial intervention, are principles firmly established by the decisions of this court:" . . . In Fok Young Yo *v.* United States, 185 U. S. 296, it was held that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive, and, still more to the point, in Lem Moon Sing *v.* United States, 158 U. S. 538, where the petitioner for *habeas corpus* alleged facts which, if true, gave him a right to enter and remain in the country, it was held that the decision of the collector was final as to whether or not he belonged to the privileged class. . . .

In view of the cases which we have cited it seems no longer open to discuss the question propounded as a new one. Therefore we do not analyze the nature of the right of a person presenting himself at the frontier for admission. . . . But it is not improper to add a few words. The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law was affirmed and explained in Nishimura Ekiu *v.* United States, 142 U. S. 651. . . .

CHAPTER XXIII

THE TREATY-MAKING POWER

Congress frequently confers on the President the power of entering into agreements on various matters such as international mail service, trade-marks, or matters of commercial routine. In addition to agreements under statutory authority, the President as Chief Executive may enter into other international agreements of a temporary nature. While such agreements do not, as a rule, deal with matters of political character, President Roosevelt's action in 1905 shows that occasionally issues of great importance may be involved. The Senate had failed to ratify a treaty with Santo Domingo, and the President, who afterward stated that the senators had shirked their duty, proceeded to carry out the purposes of the treaty under an executive agreement. The President's action was severely criticised in the Senate, the dangers involved in such exercise of power being pointed out. A treaty was finally ratified in 1907. The Santo Domingo episode had adverse effects on the arbitration treaties which Mr. Roosevelt negotiated and submitted to the Senate. The question whether these treaties contemplated a preliminary "agreement" which was to be made by the President alone, led naturally to the larger question, whether the Chief Executive could enter upon any agreements or conventions with foreign nations which did not require the advice and consent of the Senate. Many interesting precedents are involved. It must be remembered that this discussion is colored by partisanship and by the historic mutual jealousy between President and Senate in matters of foreign policy. Some of the same arguments were repeated in the course of the historic debates on the League of Nations Covenant in 1919–20.

69. *Senator Rayner on President Roosevelt and Santo Domingo* [1]

. . . In the Santo Domingo affair the President has evidently made his own treaty. I am not discussing the proposition whether his views and purposes are right or wrong in reference to Santo Domingo. He may be right —a great many persons think that he is. He may have performed a great public service for the people of that island and for civilization and humanity in the efforts

[1] January 31, 1907. *Congressional Record*, 59 Congress, 2 Session, XLI, 2006.

that he has made to extricate them from their difficulties and misfortunes. This is not the point at issue. The charge that I make is that he has accomplished this in violation of the Constitution, and has set an example for his successors which, if followed, would abrogate the provision that gives this body the right to be consulted in the treaty-making power.

The principal provision of the Santo Domingo treaty relates to the collection of the revenues of the island and their distribution among its creditors. All other parts of the treaty were subordinate to this. What has been done? The treaty has been practically carried into effect without consulting the Senate. The appointment of an American agent as an official at Santo Domingo to collect its customs was simply a cover and an evasion. Under the principles of international law and the comity of nations this Government is morally bound for the proper custody of this fund, and would be liable in case of its waste or loss. After its collection the only act of any consequence that remained to be done was its distribution, and even this has been practically determined upon, I understand, by settlement with her creditors.

Now, when you add to this the fact that our war ships are in the harbors of the island ostensibly for the purpose of protecting American interests, but in reality protecting the officials of the island against any menace from without, and revolution from within, you have the establishment of a sovereignty or a protectorate without a word from Congress or the Senate sanctioning the same. This is called a *modus vivendi*, but the phrase *modus vivendi* has no application to a condition of this sort, and is a perfectly meaningless absurdity in this connection. What is being done is the maintenance of a *status quo*, but a *status quo* created by the President at the time of the negotiation of the treaty, and without any warrant of law whatsoever. I do not believe that in all the archives of the State Department there can be found any precedent for such a proceeding. Any President could at any time, following this example, make an agreement with any foreign country, uphold it by armed intervention, and

then if the Senate declined to confirm his action simply announce that he proposed to maintain the *status quo* or *modus vivendi* as it is erroneously called, and thus practically effectuate a treaty whether the Senate consents or not. What the President has done in reference to Santo Domingo he can duplicate any day with respect to any of the bankrupt and revolutionary Republics of Central or South America. They may appeal to him for help. He may negotiate a treaty and the Senate may decline to act upon the treaty, and in the meantime he may enter into an agreement with them to collect their customs duties, place them on deposit in an American bank, and in the custody of an American representative, and when Congress or the Senate calls him to account he can, with absolute defiance, announce that the work has been done, and that it is the duty of this Government to make a proper division of the funds. . . .

70. *Treaties and Executive Agreements* [1]

. . . During November and December, 1904, and January, 1905, there were signed at Washington by Mr. Hay, on the part of the United States, and by the ministers of various other countries, ten general treaties of arbitration. . . .

The second article of these treaties reads thus:

"In each individual case the high contracting parties, before appealing to the permanent court of arbitration, shall conclude a special agreement defining clearly the matter in dispute and the scope of the powers of the arbitrators, and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure." . . .

On January 20, 1905, there was signed at Santo Domingo City, by Commander A. C. Dillingham, U. S. N., and Mr. Dawson, the American minister, on the one part, and by the Dominican minister of foreign affairs, on the other, a protocol under which the United States was to guarantee the integrity of the Dominican territory, under-

[1] John Bassett Moore, in *Political Science Quarterly*, September, 1905. Reprinted by permission.

take the adjustment of foreign claims, administer the finances on certain lines, and assist in maintaining order. As it was stipulated that the arrangement should take effect February 1, the inference was widely drawn that there existed an intention to treat the protocol as a perfected international agreement without submitting it to the Senate. Such an intention was soon afterwards disclaimed by the administration; but the incident resulted in the raising of the broad question as to the power of the president to enter into international agreements of any kind without the advice and consent of the Senate, and the discussion was soon found to involve the second article of the arbitration treaties. By this article, as we have seen, it was provided that the president should in each individual case, before appealing to the permanent court of arbitration, conclude a "special agreement," defining the matter in dispute and the scope of the arbitrators' powers and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure. As announced in the press, the position was taken by senators that the "special agreement" required in each case must be in the form of a treaty, duly submitted to the Senate for its advice and consent. The president, on the other hand, took the ground that the arbitration treaties, if approved by the Senate and afterwards ratified, would in themselves constitute complete legislative acts, which it would be within his powers as executive to carry into effect, as occasion might arise; and that, if a new treaty were required in each particular case, the general treaties would fail to accomplish their primary purpose and would in reality constitute a step backward, rather than a step forward, in the development of the practice of international arbitration by the United States. These views the president embodied in a letter to Senator Cullom, which was in the nature of a protest against the position which senators were understood to have taken. On receiving this letter, the Senate, with only seven dissenting votes, immediately amended the treaties by striking out of the second article the word "agreement" and substituting for it the word "treaty," so that it would be necessary

in each individual case before proceeding to arbitration to conclude a special "treaty," defining the matter in dispute and the scope of the arbitrators' powers, as well as fixing the periods for the formation of the tribunal and the several stages of the procedure. When the treaties as thus amended were returned to the president, it was announced that he would not submit them in their amended form to the other governments concerned but would consider the action of the Senate as constituting in principle a disapproval of them.

As the record stands, issue was thus joined on the broad question whether it is within the power of the president to conclude any "agreement," or at any rate any arbitral agreement, with a foreign power without the advice and consent of the Senate. . . .

In diplomatic literature, the words "treaty," "convention," and "protocol" are all applied, more or less indiscriminately, to international agreements. The words "convention" and "protocol" are indeed usually reserved for agreements of lesser dignity, but not necessarily so. In the jurisprudence of the United States, however, the term "treaty" is properly to be limited, although the federal statutes and the courts do not always so confine it, to agreements approved by the Senate. Such an agreement may be and often is denominated a "convention," and perchance might be called a "protocol"; but it is also, by reason of its approval by the Senate, in the strict sense a "treaty," and possesses, as the product of the treaty-making process, a specific legal character. By the constitution of the United States, a "treaty" is a "supreme law of the land," having the force of an act of Congressional legislation and overriding any inconsistent provisions not only in the constitutions and laws of the various states, but also in prior national statutes. It is at once an international compact and a municipal law, and in its latter character directly binds the courts and the individual inhabitants of the country. In this respect the legal system of the United States differs from that of most other governments under which a "treaty," although it represents a binding international compact,

becomes legally operative upon courts and individuals only when the legislature adopts it and enacts it into law. . . .

Such being the nature and meaning of the term "treaty" in the jurisprudence of the United States, we find that the government has been in the habit of entering into various kinds of agreements with foreign powers without going through the process of treaty-making. The conclusion of agreements between governments, with more or less formality, is in reality a matter of constant practice, without which current diplomatic business could not be carried on. A question arises as to the rights of an individual, the treatment of a vessel, a matter of ceremonial, or any of the thousand and one things that daily occupy the attention of foreign offices without attracting public notice; the governments directly concerned exchange views and reach a conclusion by which the difference is disposed of. They have entered into an international "agreement"; and to assert that the secretary of state of the United States, when he has engaged in routine transactions of this kind, as he has constantly done since the foundation of the government, has violated the constitution because he did not make a treaty, would be to invite ridicule. Without the exercise of such power it would be impossible to conduct the business of his office.

But, in addition to agreements made in the transaction of current business, we find that the executive has entered into international agreements of a more formal kind, without resorting to the treaty-making process.

The agreement of 1817, for the limitation of naval armaments on the Great Lakes, was made and carried into effect by the executive, though it was afterwards submitted to the Senate. By a protocol signed at London, December 9, 1850, by Abbott Lawrence, American minister, on the part of the United States, and by Viscount Palmerston, on the part of Great Britain, it was agreed that the British crown should cede to the United States Horseshoe Reef in Lake Erie, and that the United States should accept it, on the conditions of erecting a lighthouse there and maintaining no fortifications. On receipt

of the protocol, Mr. Webster, as secretary of state, on January 7, 1851, instructed Mr. Lawrence to acquaint the British government that the arrangement was "approved" by the government of the United States. This Mr. Lawrence did on the 17th of the succeeding month. Congress made appropriations for the erection of the light-house, which was built in 1856. The validity of the title thus gained will hardly be disputed. . . .

Another remarkable exercise by the president alone of the power to make agreements with foreign countries is found in the protocol concluded at Peking on September 7, 1901, between China and the allied powers who had coöperated in the march to Peking for the relief of the foreign legations. This protocol was signed on the part of the United States by Mr. W. W. Rockhill, now minister to China, who was then acting as a special commissioner to China by executive appointment alone. It embraced numerous topics, including reparation by China for the murder of the German minister at Peking, the infliction of punishment on the principal authors of the outrages and crimes committed against foreign governments and their nationals, the prohibition by China of the importation of arms and ammunition as well as of the materials exclusively used for their manufacture, the payment to the allies of an indemnity of 450,000,000 taels, the constitution of an extraterritorial quarter for the use of the foreign legations in Peking, the temporary occupation by the powers of certain points in order to keep open the communication between the capital and the sea, and undertakings on the part of China to negotiate amendments to her existing treaties, to improve the navigability of the Peiho river, and to transform her office of foreign affairs into a ministry of foreign affairs, which was to take precedence over the six ministries of state.

There are certain definite classes of international agreements which are made by the executive under acts of Congress. It is a peculiarity of these agreements that, so long as the statute under which they are concluded stands unrepealed, they have precisely the same mu-

nicipal force as treaties, being in effect laws of the land. And sometimes they relate to subjects which might be and perhaps have been dealt with by the treaty-making power.

As the first illustration of this type of agreements we may take postal "treaties" or conventions. Originally it seems to have been supposed that such agreements must be submitted to the Senate. On March 6, 1844, a postal convention was signed between the United States and New Granada, with special reference to the isthmus of Panama. It was transmitted by President Tyler to the Senate May 7, and on the 13th it was read the first and second times by unanimous consent, and was ordered to be referred to the committee on foreign relations and to be printed in confidence for the use of the Senate. It was approved without amendment June 12. A similar course was taken in other cases; but the procedure was altogether changed by the act of Congress of June 8, 1872, entitled "An act to revise, consolidate and amend the statutes relating to the post office department." By section 167 of this act it was provided that, "for the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them," the postmaster-general, "by and with the advice and consent of the president," might "negotiate and conclude postal treaties or conventions," and might "reduce or increase the rates of postage on mail-matter conveyed between the United States and foreign countries." By section 20 of the same act, the postmaster-general is required to transmit a copy of each postal convention concluded with a foreign government to the secretary of state, who is to furnish a copy to the public printer for publication; but the proof-sheets are to be revised in the post office department. These provisions have since governed the negotiation and conclusion of postal treaties, and they are now embodied in the revised statutes of the United States, as sections 398 and 399.

Another class of international agreements, concluded by the government of the United States under the au-

thority of an act of Congress, is that of arrangements with foreign powers in relation to commercial reciprocity. Such were the agreements made by the United States under section 3 of the act of October 1, 1890, commonly called the McKinley act. By section 3 of this act the president was authorized to impose duties at certain rates on specified articles, whenever, in his judgment, the duties imposed by the country of exportation on goods imported from the United States were, in view of the free admission of such specified articles into the United States, "reciprocally unequal or unreasonable." This retaliatory provision was used for the purpose of securing reciprocal commercial agreements with other powers; and ten such agreements were in fact concluded with Austria-Hungary, Brazil, the Dominican Republic, Germany, Great Britain, Guatemala, Honduras, Nicaragua, Salvador and Spain. These agreements remained in force till they were terminated by section 71 of the tariff of August 27, 1894, generally known as the Wilson-Gorman act. . . .

During the first eighty years of government under the constitution, agreements with the Indian tribes were made exclusively by the president and the Senate, in the exercise of the treaty-making power. Since 1871, however, the subject has been dealt with exclusively by the president and Congress. This circumstance is due to the act of Congress of March 3, 1871, now incorporated in section 2079 of the revised statutes, by which it is expressly provided that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." Previously to this statute, the president, by the act of July 5, 1862, now embodied in section 2080 of the revised statutes, was, whenever the tribal organization of any Indian tribe was in actual hostility to the United States, authorized by proclamation to declare all treaties with such tribe to be abrogated, if in his opinion it could be done consistently with good faith and with legal and national obligations.

The passage of the act of 1871 was strongly opposed

by certain members of the House as well as of the Senate, on the ground that it involved an infringement of the treaty-making power vested in the president and the latter body. It was admitted that if the president should undertake to make a treaty with the Indians, Congress could not interfere with his doing so, by and with the advice and consent of the Senate; but it was, on the other hand, maintained that Congress had the power to declare whether the tribes were independent nations for the purposes of treaty-making, and to render its declaration effective by refusing to recognize any subsequent treaties with them; and this view prevailed. . . .

It thus appears that, if we include only the more formal settlements, there have been thirty-one cases in which claims against foreign governments have been settled by executive agreement, and that twenty-seven arbitrations have been held under such agreements as against nineteen under treaties, where the settlement embraced claims against the foreign government alone and not against the United States. . . .

In view of what has been set forth, it is evident that the position that the president can make no agreement with a foreign power, except in the form of a treaty approved by the Senate, cannot be maintained; and that, if he had consented to be deprived, by amendment of the arbitration treaties, of the right to agree to the submission of any question whatsoever thereunder except by means of a new treaty, he would have waived the exercise of a power which he has constantly used. If the Senate had amended the treaties by inserting, after the word "agreement," the words "or treaty," the issue would have been more correctly drawn; but it must in fairness be admitted that this would not have accomplished the Senate's object in assuring to itself an opportunity to exercise its judgment upon the propriety of executive action in each particular case. It should also, in fairness, be admitted that they go too far who assert that the Senate, in amending the treaties, committed an act that was not legally justifiable. The law of the constitution is not more to be found in the letter of that in-

strument than in the practice under it, and the Senate has from the foundation of the government exercised the power of amending treaties. It has constantly given its "advice and consent" in that form. . . .

CHAPTER XXIV

TREATY-MAKING POWER VERSUS POLICE POWER

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." In actual practice, however, the power of the Federal Government to enforce its treaties has proved inadequate. It has been placed in the humiliating position of being unable to protect foreign citizens from outrages by offenders who have been under the jurisdiction of sympathetic or indifferent local officers. Treaties have guaranteed mutual protection of life and property and the United States has repeatedly demanded the punishment of foreign officials who failed to protect Americans within their jurisdiction, while as in the case of the New Orleans lynchings of 1891 where several Italian citizens lost their lives, Federal authority proved impotent to deal with State officers who were derelict, or worse, in the performance of duty.

The San Francisco school controversy of 1907 is in a somewhat different category, but involves the same issue of Federal *v.* State authority in matters involving the treaty rights of aliens. After Chinese immigration had been ended, the problem of dealing with the increasing number of Japanese became acute. In this case the situation was especially serious, as the immigrants came from a powerful nation, proud and resentful at anything resembling racial discrimination. Unpleasant incidents arose after the school question had been settled, due to various California enactments, especially those regarding land tenure, which the Japanese considered discriminatory. The most important of the constitutional issues involved is the question whether the United States by treaty can enter the sphere of authority reserved to the States by the Tenth Amendment. Stated conversely, may a State in the proper exercise of its police power make laws which violate the terms of treaties of the United States? One of the weaknesses of the federal system of government is here apparent.

71. *The San Francisco School Controversy* [1]

. . . The treaty of November 22, 1894, between the United States and Japan provided, in the first article:

"The citizens or subjects of each of the two high con-

[1] Elihu Root, "The Real Questions under the Japanese Treaty and the San Francisco School Board Resolution," *American Journal of International Law*, April, 1907. Reprinted by permission.

tracting parties shall have full liberty to enter, travel, or reside in any part of the territory of the other contracting party, and shall enjoy full and perfect protection for their persons and property. . . .

"In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation.". . .

The statutes of California provide in section 1662 of the school law:

"Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the board of school trustees, or city board of education, have power to admit adults and children not residing in the district, whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school."

On the 11th of October, 1906, the board of education of San Francisco adopted a resolution in these words:

"*Resolved:* That in accordance with Article X, section 1662, of the school law of California, principals are hereby directed to send all Chinese, Japanese, or Korean children to the Oriental Public School, situated on the south side of Clay street, between Powell and Mason streets, on and after Monday, October 15, 1906."

The school system thus provided school privileges for all resident children, whether citizen or alien; all resident children were included in the basis for estimating the

amount to be raised by taxation for school purposes; the fund for the support of the school was raised by general taxation upon all property of resident aliens as well as of citizens; and all resident children, whether of aliens or of citizens, were liable to be compelled to attend the schools. So that, under the resolution of the board of education, the children of resident aliens of all other nationalities were freely admitted to the schools of the city in the neighborhood of their homes, while the children of Indians, Chinese and Japanese were excluded from those schools, and were not only deprived of education unless they consented to go to the special oriental school on Clay street, but were liable to be forcibly compelled to go to that particular school. . . .

It is obvious that three distinct questions were raised by the claim originating with Japan and presented by our national government to the courts in San Francisco. The first and second were merely questions of construction of the treaty. . . .

The other question was whether, if the treaty had the meaning which the government of Japan ascribed to it, the government of the United States had the constitutional power to make such a treaty agreement with a foreign nation which should be superior to and controlling upon the laws of the state of California. A correct understanding of that question is of the utmost importance not merely as regards the state of California, but as regards all states and all citizens of the Union.

There was a very general misapprehension of what this treaty really undertook to do. It was assumed that in making and asserting the validity of the treaty of 1894 the United States was asserting the right to compel the state of California to admit Japanese children to its schools. No such question was involved. That treaty did not, by any possible construction, assert the authority of the United States to compel any state to maintain public schools, or to extend the privileges of its public schools to Japanese children or to the children of any alien residents. The treaty did assert the right of the United States, by treaty, to assure to the citizens of a

foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any state chooses to extend privileges to alien residents as well as to citizen residents, the state will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries. The effect of such a treaty, in respect of education, is not positive and compulsory; it is negative and prohibitory. It is not a requirement that the state shall furnish education; it is a prohibition against discrimination when the state does choose to furnish education. It leaves every state free to have public schools or not, as it chooses, but it says to every state: "If you provide a system of education which includes alien children, you must not exclude these particular alien children."

It has been widely asserted or assumed that this treaty provision and its enforcement involved some question of state's rights. There was and is no question of state's rights involved, unless it be the question which was settled by the adoption of the constitution.

This will be apparent upon considering the propositions which I will now state:

1. The people of the United States, by the constitution of 1787, vested the whole treaty-making power in the national government. . . .

Legislative power is distributed: upon some subjects the national legislature has authority; upon other subjects the state legislature has authority. Judicial power is distributed: in some cases the federal courts have jurisdiction, in other cases the state courts have jurisdiction. Executive power is distributed: in some fields the national executive is to act; in other fields the state executive is to act. The treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation to and representation of every citizen

in every state. Every treaty made under the authority of the United States is made by the national government, as the direct and sole representative of every citizen of the United States residing in California equally with every citizen of the United States residing elsewhere. It is, of course, conceivable that, under pretense of exercising the treaty-making power, the president and senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of the power goes, there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question.

2. Although there are no express limitations upon the treaty-making power granted to the national government, there are certain implied limitations arising from the nature of our government and from other provisions of the constitution; but those implied limitations do not in the slightest degree touch the making of treaty provisions relating to the treatment of aliens within our territory.

In the case of Geofroy *v.* Riggs, which, in 1889, sustained the rights of French citizens under the treaty of 1800 to take and hold real and personal property in contravention of the common law and the statutes of the state of Maryland, the supreme court of the United States said:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. . . . The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of

the latter without its consent. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

3. Reciprocal agreements between nations regarding the treatment which the citizens of each nation shall receive in the territory of the other nation are among the most familiar, ordinary and unquestioned exercises of the treaty-making power. To secure the citizens of one's country against discriminatory laws and discriminatory administration in the foreign countries where they may travel or trade or reside is, and always has been, one of the chief objects of treaty making, and such provisions always have been reciprocal. . . .

4. It has been settled for more than a century that the fact that a treaty provision would interfere with or annul the laws of a state as to the aliens concerning whom the provision is made, is no impeachment of the treaty's authority.

The very words of the constitution, that the judges in every state shall be bound by a treaty "any thing in the constitution or laws of any state to the contrary notwithstanding," necessarily imply an expectation that some treaties will be made in contravention of laws of the states. Far from the treaty-making power being limited by state laws, its scope is entirely independent of those laws; and whenever it deals with the same subject, if inconsistent with the law, it annuls the law. This is true as to any laws of the states, whether the legislative authority under which they are passed is concurrent with that of congress, or exclusive of that of congress.

In the case of Ware *v.* Hylton the supreme court of the United States, in the year 1796, considered the effect under the Constitution of the treaty of peace with England of 1783, which provided that "creditors on either side should meet with no lawful impediment to the recovery of the full value in sterling money, of all *bona fide* debts, theretofore contracted," as against a law of the state of Virginia, which confiscated to the state of Vir-

ginia the debts due from its citizens to British subjects.

The court said:

"There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government and to treaties made by their authority. A treaty cannot be the supreme law of the land—that is, of all the United States—if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state; and their will alone is to decide.". .

In the case of Fairfax *v.* Hunter, in 1812, Mr. Justice Story delivering the opinion, the supreme court of the United States sustained the title of a British subject, under the provisions of the treaty of 1794, in direct contravention of the laws of the state of Virginia. In the case of Chirac *v.* Chirac, in 1817, Chief Justice Marshall delivering the opinion, the supreme court of the United States sustained the title of a French subject to real estate in Maryland, in direct contravention of the laws of that state. A long line of cases have followed in the supreme court applying the provisions of various treaties and maintaining without exception the unvarying rule that the state statute falls before the treaty.

It equally appears from these cases that the treaty provisions which were sustained by the supreme court and the state laws which were declared void, so far as they conflicted with a treaty, related to matters regarding which congress had no power to legislate, but upon which, in the distribution of legislative powers under the con-

stitution, the states, and the states alone, had power to legislate.

5. Since the rights, privileges, and immunities, both of person and property, to be accorded to foreigners in our country and to our citizens in foreign countries are a proper subject of treaty provision and within the limits of the treaty-making power, and since such rights, privileges, and immunities may be given by treaty in contravention of the laws of any state, it follows of necessity that the treaty-making power alone has authority to determine what those rights, privileges, and immunities shall be. No state can set up its laws as against the grant of any particular right, privilege, or immunity any more than against the grant of any other right, privilege, or immunity. No state can say a treaty may grant to alien residents equality of treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of the state for the judgment of the president and senate in exercising a power committed to them and prohibited to the states by the constitution. . . .

72. *Senator Rayner on the Treaty-Making Power* [1]

I plant myself firmly and unalterably upon the proposition that we can make no treaty that violates any of the provisions of the Constitution of the United States, that the treaty-making power in the sixth article must be construed *in pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument the treaty must yield and the Constitution prevail.

As a corollary of this proposition I plant myself upon the doctrine that any treaty that violates Article X of the Constitution and infringes upon the reserved rights of the States which have not been delegated to the General Government, and embraces subjects that belong to

[1] December 12, 1906. *Congressional Record*, 59 Congress, 2 Session, XLI, 299–302 *passim*.

the States, and that are not necessary to carry out the purposes of the Government as defined in the Constitution, is *ultra vires* and not within the capacity of the Government to make. . . .

Have we a right to violate the Constitution of the United States and incorporate in a treaty powers not delegated to the United States, powers that are not necessary and proper for carrying into execution the powers that are delegated, and barter away the privileges and rights reserved to the States respectively by virtue of the instrument and of the tenth amendment thereto that I have just referred to? The power of a State to regulate its public school system is clearly among its reserved powers. Have we, therefore, a right to provide in a treaty that the citizens of foreign lands shall possess privileges in the public schools of the States that are prohibited either by the Constitution or by the laws of the State in which they are claimed? If we can, in defiance of the laws and constitution of a State, incorporate any such provision in a treaty so as to bind the State, then we can undoubtedly deprive the State of every reserved right that it possesses, and rescind and annul its laws and its constitution whenever they come in conflict with the treaty-making power. . . .

The treaty referred to in Chirac *v.* Chirac and in Ware *v.* Hylton was made under the Articles of Confederation. It was not made under the Constitution at all. If you will look at the sixth article of the Constitution, you will see that it ratifies all treaties that have been made. This was one of the treaties that it ratified, because it was a treaty under the Articles of Confederation, and, furthermore, Justice Cushing, in uniting in the opinion of the court, says that Virginia was a party to the treaty, and being a party to the treaty she could not abrogate her own act, and she was estopped by having participated in it and having been a party to it. We all recollect that under the Articles of Confederation it was necessary that nine States should assent to a treaty before it became effective. . . .

I do not for a moment set up the reserved rights of the

States against the exercise of any constitutional power that may be incorporated in a treaty. I admit that the United States can enter into any treaty with any foreign power in reference to any subject embraced in the Constitution. I deny, however, that it possesses any inherent right to make a treaty, and I claim that the treaty-making power lies in grant and not in sovereignty and must be construed *in pari materia* with all the other clauses of the instrument that creates it, and that in interpreting the treaty-making power we must be governed by the principles of international law, its usages and its practices, as those principles, usages, and practices appertain to our form of constitutional government. I utterly deny that we have any right to make a treaty that violates that Constitution, or deprives the States of their reserved rights to conduct their local affairs over which the Federal Government has no jurisdiction, and which they alone have the right to administer according to their own constitutions and statutes. . . .

73. *Report of the Judiciary Committee of the House of Representatives* [1]

The language of the Constitution of the United States which gives the character of "supreme law" to a treaty, confines it to "treaties made under the authority of the United States." That authority is limited and defined by the Constitution itself. The United States has no unlimited, but only delegated authority. The power to make treaties is bounded by the same limits which are prescribed for the authority delegated to the United States by the Constitution. To suppose that a power to make treaties with foreign nations is unlimited by the restraints imposed on the power delegated to the United States would be to assume that by such treaty the Constitution itself might be abrogated and the liberty of the people secured thereby destroyed. The power to contract must be commensurate with and not transcend the powers

[1] *House Reports*, No. 4177, 49 Congress, 2 Session, March 3, 1887. The point at issue was the constitutionality of tariff provisions in a treaty with the Hawaiian Islands.

by virtue of which the United States and their government exist and act. It cannot contract with a foreign nation to do what is unauthorized or forbidden by the Constitution to be done. The power to contract is limited by the power to do.

It is on this principle that a treaty cannot take away essential liberties secured by the Constitution to the people. The treaty power must be subordinate to these. A treaty cannot alien a State or dismember the Union, because the Constitution forbids both.

In all such cases the legitimate effect of a treaty is to bind the United States to do what they are competent to do and no more. The United States by treaty can only agree with another nation to perform what they have authority to perform under the constitutional charter creating them. The treaty makes the *nexus* which binds the faith of the Union to do what their Constitution gives authority to do. A treaty made under that authority may do this; all its attempts to do beyond it is *ultra vires*—is null, and cannot bind them.

CHAPTER XXV

THE SEVENTEENTH AMENDMENT

The Senate was long the bulwark of conservatism and State rights. Conservatism and State rights were not as popular in 1890, however, as they had been a century earlier. Democracy and nationalism had developed more rapidly since the Civil War. With the movement for Federal control of private business came a belief that corporate wealth was intrenched in the upper chamber, and that only popular election could make the Senate representative of public will. Most of the defects of the system of indirect election, as well as its merits, are set forth in the following articles. It is interesting to note that a means of circumventing constitutional prescriptions had been discovered long before the Seventeenth Amendment was proclaimed in force May 31, 1913. The change in the method of election has produced no very startling results. The charge has been frequently made that the Senate has deteriorated in personnel, has become more demagogic and more inclined to play politics than in former years, but such claims are difficult to substantiate and, if true, are not necessarily due to the method of election.

74. *Bryce on the Indirect Method of Electing Federal Senators* [1]

The method of choosing the Senate by indirect election used to excite the admiration of foreign critics, who found in it a sole and sufficient cause of the excellence of the Senate as a legislative and executive authority. I shall presently inquire whether the critics were right. Meantime it is worth observing that the election of senators has in substance almost ceased to be indirect. They are still nominally chosen, as under the letter of the Constitution they must be chosen, by the State legislatures. The State legislature means, of course, the party for the time dominant, which holds a party meeting (caucus) and decides on the candidate, who is thereupon elected, the party going solid for whomsoever the majority has approved. Now the determination of the caucus has

[1] *The American Commonwealth* (Edition of 1910), I, 100. Copyright, 1910, by The Macmillan Company. Reprinted by permission.

very often been arranged beforehand by the party managers. Sometimes when a vacancy in a senatorship approaches, the aspirants for it put themselves before the people of the State. Their names are discussed at the State party convention held for the nomination of party candidates for State offices, and a vote in that convention decides who shall be the party nominee for the senatorship. This vote binds the party within and without the State legislature, and at the election of members for the State legislature, which immediately precedes the occurrence of the senatorial vacancy, candidates for seats in that legislature are frequently expected to declare for which aspirant to the senatorship they will, if elected, give their votes. Sometimes the aspirant, who is of course a leading State politician, goes on the stump in the interest of those candidates for the legislature who are prepared to support him, and urges his own claims while urging theirs. I do not say that things have, in most States, gone so far as to make the choice by the legislature of some particular person as senator a foregone conclusion when the legislature has been elected. Circumstances may change; compromises may be necessary; still, it is now generally true that a reduced freedom of choice remains with the legislature. The people, or rather those wire-pullers who manage the people and act in their name, have usually settled the matter at the election of the State legislature. So hard is it to make any scheme of indirect election work according to its original design; so hard is it to keep even a written and rigid constitution from bending and warping under the actual forces of politics. . . .

75. *An Act to Regulate the Times and Manner of Holding Elections for Senators in Congress* [1]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the legislature of each State which shall be chosen next preceding the expiration of the time for which any

[1] *United States Statutes at Large,* XIV, 243. July 25, 1866.

senator was elected to represent said State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a senator in Congress, in the place of such senator so going out of office, in the following manner: Each house shall openly, by a viva voce of each member present, name one person for senator in Congress from said State, and the name of the person so voted for, who shall have a majority of the whole number of votes cast in each house shall be entered on the journal of each house by the clerk or secretary thereof; but if either house shall fail to give such majority to any person on said day, that fact shall be entered on the journal. At twelve o'clock, meridian, of the day following that on which proceedings are required to take place, as aforesaid, the members of the two houses shall convene in joint assembly and the journal of each house shall then be read, and if the same person shall have received a majority of all the votes in each house, such person shall be declared duly elected senator to represent said State in the Congress of the United States; but if the same person shall not have received a majority of the votes in each house, or if either house shall have failed to take proceedings as required by this act, the joint assembly shall then proceed to choose, by a viva voce vote of each member present for the purpose aforesaid, and the person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected; and in case no person shall receive such majority on the first day, the joint assembly shall meet at twelve o'clock, meridian, of each succeeding day during the session of the legislature, and take at least one vote until a senator shall be elected.

Sec. 2. *And be it further enacted*, That whenever, on the meeting of the legislature of any State, a vacancy shall exist in the representation of such State in the senate of the United States, said legislature shall proceed, on the second Tuesday after the commencement and organization of its session, to elect a person to fill such vacancy, in the manner hereinbefore provided for the election of

a senator for a full term; and if a vacancy shall happen during the session of the legislature, then on the second Tuesday after the legislature shall have been organized and shall have notice of such vacancy.

Sec. 3. *And be it further enacted*, That it shall be the duty of the governor of the State from which any senator shall have been chosen as aforesaid to certify his election, under the seal of the State, to the President of the senate of the United States, which certificate shall be countersigned by the secretary of state of the State.

76. *The Consequences of Election by State Legislatures* [1]

Entirely aside from any effect upon the quality or political character of the State's representation in the Senate, are certain results of grave significance for the individual state legislature. It is no exaggeration to say that there is never a long contest over a senatorial election which does not do serious harm to the interests of the Commonwealth which its lawmakers are chosen to guard. The injury may seem to consist simply in the consumption of the time required for the ballots, and in the developing of political excitement which would not otherwise have arisen. But each of these may involve consequences of grave import. Each ballot takes a very considerable amount of time, and when the session is limited to forty or sixty days, the inroads thus made upon the legislature's hours curtail very materially the time which is available for its normal work in the service of the State. . . .

Not only does the State suffer through the interruption of its normal legislative work, but the election of senators injects into state politics an incongruous and disorganizing element. There can be no question that this is one of the strongest influences which tend to submerge state parties and to subordinate local issues, of however great importance. These effects are not to be gauged quantitatively by statistics, but they are matters of the commonest observation and of the utmost significance. Not

[1] G. H. Haynes, *The Election of Senators*, 65–70 *passim*. Reprinted by permission of Henry Holt and Company, New York City.

only may an impending election of senator throw every consideration of state affairs into the background in the election of members of the legislature, as in Connecticut during the summer and autumn of 1904—it may even subordinate all interest in a presidential campaign. "This year, the question in Delaware is not 'Roosevelt or Parker?' but 'Addicks or no Addicks?'" Whether these words are correctly attributed to Mr. Addicks himself or not, there is not the slightest doubt that they stated the exact truth of the situation. . . .

77. *Senatorial Deadlocks* [1]

The success of unfit men in securing election to the Senate through Legislatures by wirepulling or corruption, when they might not have succeeded if they had been forced to go before the people, influences some, though unfit men are often elected Governors by the use of the same methods. Others are impressed by the injustice of a system which enables a party that is in the minority on the popular vote, to secure the Senatorship through its control of the Legislature, as has repeatedly happened in Connecticut; that State having more than once gone for a Democrat for President, and yet on the same day, under the town system of representation, elected a Legislature which chose a Republican Senator. Another argument for the proposed change is, that it would always result in an immediate choice, whereas the old system often delays one for weeks and months, and sometimes prevents it altogether, while practically wrecking the session of the Legislature. Delaware has now no Senator, because neither in 1898 nor in 1900 could the Legislature reach a choice. Three years ago the Legislatures of Pennsylvania, Utah and California also balloted for Senator without result until their terms expired, and one seat from each of those States was vacant in the following session of Congress. The Legislatures of Montana and Oregon used up nearly two months in filling vacancies, a year ago, and the Legislature of Nebraska almost three

[1] Editorial article in *The Nation*, March 20, 1902. Reprinted by permission.

months. Five years ago, not only did the Oregon Legislature fail to elect a Senator, but the controversy over the matter prevented the organization of the body and action of any sort. This was an extreme case of legislative paralysis from the mixing of State and Federal functions in the members, but there is never a Senatorial deadlock that does not harm the interests of the commonwealth which its lawmakers are chosen to guard. As the tendency towards deadlocks has grown steadily of late years, it is no wonder that relief is sought in a removal of the cause. . . .

78. *Speech of Senator Turpie of Indiana* [1]

The election of Senators by a direct vote of the people of the several States is a reform much needed at this period of our history to bring the whole scheme of government into harmony with its several parts, so that Senators, whether serving at Washington or in the capital of the State, shall be the immediate agents and servants of the people and be personally answerable directly to the people as such. The people in more than a hundred years of our history, in peace and war, in prosperity and adversity, have shown themselves entirely worthy of this trust and confidence.

The era of almost exclusive supremacy formerly enjoyed by the legislatures of the States has passed away. The only remnant of it remaining is the election of United States Senators, a method out of accord with the broad and liberal extension of the franchise now everywhere prevalent. The extension of the elective franchise during the last fifty years has been very great, but the exercise of it in choosing the officers of the government in the several States has been yet greater. The number of voters in the States, by the abolition of restrictions on the franchise, has been very much increased, but the number of officers to be voted for has been even more enlarged. In the early days of this Republic, the legislatures of the States chose the whole body of the executive and judicial

[1] March 23, 1897. *Congressional Record*, 55 Congress, 1 Session, XXX, 171.

officers therein, and often selected them from among their own number. . . .

Now, in every one of the forty-five States, but with few exceptions, these officers, from the highest to the lowest, are elected by a direct vote of the people. The pending amendment does not propose so great a change as this, but it does propose that the Congress, in both branches, shall be chosen by the people in the same manner as the senate and house of the legislatures of the States are now chosen. Thus we may perfect the symmetry of our frame of government, and recognize the immediate sovereignty of the people in its legislative department. . . .

The legislative caucus, which at the capital of a State usually selects the candidate for a membership of this body, is an assembly peculiarly adapted to the machinations of syndicates and trusts. The whole number of such a conference is small. The number necessary to control its choice is yet smaller. The members of it are persons in the exercise of delegated powers, distant from their constituencies, and most liable to temptation. In such an assembly the intrigue and corruption of the trusts are plants of indigenous growth. All this evil, and what is of almost as much moment, the suspicion of evil, is obliterated; it is swept away by the change which we propose. When each voter of the whole mass of voters in the State is allowed the privilege of personally choosing the Senator, the power of that syndicate, which is always a minority in numbers, is broken. Nor is it any answer to these considerations to assume that a State convention would be as subject to these malignant influences as a legislative caucus; even if this were true, the action of a convention is not final. It must yet abide, under our plan, the scrutiny of a popular vote, while the action of the caucus is final, and may often result in a choice directly adverse to popular rights and interests.

79. *Defense of the Senate by Senator Edmunds of Vermont* [1]

The founders of the republic believed that the liberty and happiness of the people of the several States—States which they foresaw would finally embrace a continent in their benign sway—could only be preserved by such divisions and subdivisions of the sources and methods and exercise of political power as they adopted and provided for. A century of experience has demonstrated the wisdom of their marvellous plan. But a new school of politicians has now appeared who profess to believe that the Fathers were mistaken in their theory of the surest foundation of our national republic, and that the system they adopted has not, in regard to senators, worked well—that the senators have not been the choice of, and have not represented, the great body of the people of the States that elected them and therefore that elections of senators should be had by the suffrage of all the voters in the State *acting together*. . . .

The second part of the assertion of the persons who have seen a new light, as they think, is that sometimes "senators do not represent their States." This is true; but happily for all the States and their people, *a senator, once chosen, becomes a senator of the United States,* and is not the mere agent of the State that chose him. And, as to the State itself that chose him, it has happened, and will happen again, that a gust of passion or a misguided opinion has taken temporary possession of a majority of the people of a particular State, which the senator, in his bounden duty to all the States, has disregarded. This was one of the very incidents that the patriots of 1787 foresaw and provided against by legislative elections and a long time of service. . . .

The real people of this republic of States and citizens —those who believe in liberty and order as inseparable, who believe in the value of individual endeavor and frugality, and, as a consequence, in the right to save earn-

[1] "Should Senators be Elected by the People?" *The Forum*, November, 1894. Reprinted by permission.

ings and to have homes and houses and lands and schools and churches—should consider:—

First, that the Constitutional provision for the choosing of two senators from each State by its legislature was wisely designed by the States that founded the government, as one of the corner-stones of the structure necessary to secure the rights and safety of the States.

Second, that a legislative instead of a popular election was adopted as necessary to the expression of the deliberate will of the State in its character as such, represented in all its parts in the way in which its own constitution distributed power.

Third, that the people of the several political divisions of the State should have the right to express their choice separately through their legal representatives, as they do in making laws, and not be overwhelmed by a mere weight of numbers that might occupy only a corner of the State and possess interests and cherish ambitions quite unlike those of all the other sections of the commonwealth.

Fourth, that the Senate as it has existed for a century has demonstrated the wisdom of the mode of its constitution.

Fifth, that its members have been as free from any just accusation of corruption, either in their election or in their course as senators, as any equal number of men connected with public affairs on the face of the earth, or connected with all the employments of private life.

Sixth, that as the election of senators by the State legislatures must be by open public voting, the danger of bribery, or the misrepresentation of constituents for other causes, is reduced to a minimum, and stands in strong contrast with the election of senators by the direct vote of the whole mass of voters in the several States, and especially in States where political parties are nearly equal in numbers.

Seventh, that, whatever evils now and then happen under the present system, they do not arise from any fault in the system itself, but from the fault of the body of citizens themselves, non-attendance at caucuses and primaries; non-attendance at registration and at the

polls; slavish fidelity to party organizations and party names; a contributing to and winking at the corrupt use of money at nominating conventions and elections; and the encouragement or tolerance of individual self-seeking in respect of getting possession of offices, all of which are truly public trusts. . . .

80. *The Oregon Plan* [1]

For many years those Southern States where but a single party organization exists have witnessed no contests for the United States Senate except within the party. The real contest occurs between members of the party in pursuit of the nomination. Thus it has come about that the primary elections of the party have all the marks of a popular election for the Senate, for there is no recent instance of a failure on the part of a legislature to elect the man whom the popular vote has designated. The legislature simply registers the will of the party as expressed in the canvass for the nomination. It has not infrequently happened that an acrimonious struggle for the nomination between several candidates, all of the same party, has been followed by the unanimous election of the successful candidate by the legislature.

Instructive as these instances are, they do not represent a normal working of the American party system. Circumstances have bound the South firmly to one of the two national party organizations, and have hardly tolerated the presence of the other. So long as there is a "solid South," the natural functioning of parties in the Southern States is impossible. Far more suggestive is the attempt of a progressive Western State to achieve the same end in the presence of a dual party system, and even by means of the party organizations. In 1904 the people of Oregon, by means of an initiative petition, secured a popular vote on a thoroughgoing direct Primaries Bill. By a large majority the measure was adopted and became law. It provides for direct nominations for all State and county offices and for many municipal offices, as well as for the

[1] Allen Johnson, "The American Senate as a Second Chamber," *The Contemporary Review*, April, 1908. Reprinted by permission.

United States Senate. In other words, each party is required to make its nominations to office by official ballot, under the control and supervision of the State, just as in a regular election. Other Western States have passed similar laws for direct primaries; but to Oregon belongs the distinction of having put the expedient to a practical test in the nomination and election of a United States Senator. In 1906, each party nominated its candidate at a primary election; these nominations were then printed on the State ballot like nominations to State and county offices, and the candidate having a plurality of votes was declared to be the choice of the people for the Senatorship. Four years previously, the people had expressed their choice in much the same way, under the Act of 1901; but the legislature of the State refused to regard itself bound by this vote. By Constitutional law, the legislature was undeniably invested with the power to elect United States Senators. When the legislature, then, elected to the Senate a man who had not received a single popular vote, there was no legal redress for the disappointed voters of the State. So, too, in this election of 1906, there was no legal way by which the legislature could be bound to obey the popular vote, which technically was nothing but a recommendation. Not to be balked a second time, the citizens of Oregon hit upon a clever device to accomplish their purpose. On nominating candidates for the legislature, the parties availed themselves of the provision of the Primaries Act which permitted them to pledge their nominees always to "vote for that candidate for the United States Senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a Senator in Congress, without regard to any individual preference." Should a candidate decline to accept such a pledge, the law provided that he might sign a second statement, to the effect that he would consider the vote of the people as "nothing more than a recommendation, which I shall be at liberty to disregard, if the reason for doing so seems to me to be sufficient." In the existing state of public opinion, most candidates

for the legislature hesitated to sign the second statement and affront their constituents, so that in the legislature which met after the election a majority were found to be pledged to obey the popular vote. The outcome was the election to the Senate of the candidate who had received a plurality of votes in the popular election. . . .

81. *Amendment XVII* [1]

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

[1] This amendment became effective, May 31, 1913. *United States Statutes at Large,* XXXVIII, 2049.

CHAPTER XXVI

CONGRESS AND ITS METHODS

The Constitution contains few provisions regarding the internal organization of Congress. The rules adopted by both branches have had, however, profound influence on our legislative history. It is never easy to adjust the ambitions and interests of the individual legislator to the necessities and responsibilities of the legislature as a representative organ of government. The House, with over four hundred members representing widely diverse constituencies and sometimes lacking party discipline, at first attempted to solve the problem by lodging autocratic power in the hands of the Speaker. Business was thereby expedited, but the dissatisfaction of various groups and minorities resulted in 1910 in drastic changes in the rules. Control was transferred to the party leaders who dominate the caucuses of both parties. The majority leaders exercised great power over the organization of committees and the general course of business, but the new system naturally lent itself more readily to compromise, and to the pressure of individual members and groups.

The Senate, unlike the House, has always allowed its members a high degree of freedom. The rule allowing what amounts to unlimited debate has given the individual senator or minority group an enormous power in legislative matters. This same rule has given the Senate a great advantage in case of disagreement with the lower chamber. The House has frequently been obliged to make concessions lest the measures it most desires to have adopted fail of passage. This has often occurred in revenue measures, the initiation of which, under the Constitution, is a prerogative of the House. The Senate's power of amending such bills, together with the advantages enjoyed because of its peculiar rules of procedure, has frequently rendered nugatory this constitutional provision. A mild closure rule was adopted in 1917 but proved of little value in checking filibustering and delay. Freedom of debate, small size, long term, share in executive functions and other factors have made the Senate the more powerful branch of our national legislature while in other modern governments the upper chamber has become of secondary importance.

Congress as a whole has declined in popular esteem. Some of the causes are due to conditions in organization and procedure which could be easily remedied. Others are more complex and are not chargeable to Congress itself. Mr. Frank W. Mondell, a veteran member, sets forth in one of the following articles some of the problems as they appear to an active participant.

82. *The Power of the Senate* [1]

. . . The River and Harbor Bill, after a protracted consideration on the part of both Houses and of their committees, and after passing both Houses in its substantial form, had reached its last stage in the report of the conference committee within less than twenty hours of the final adjournment of the Congress. An unsuccessful attempt had been made to attach to the bill, to which it bore no relation, an irrigation scheme involving scores of millions of dollars. A Senator who had the irrigation project much at heart determined to defeat the bill. It did not appeal to him that the measure had received the careful attention and approval of both Houses. The rules of the Senate permitted him, under the guise of debate, to consume all the remaining time of the session. He took the floor against the measure. To talk against time for twenty hours demands qualities which few, if any, of the greatest parliamentary orators have possessed. The "debate" which followed afforded a rare display of physical endurance. The Senator demonstrated his capacity to defeat the bill, and, to save the little time that was left to the Senate for the transaction of other urgent public business, the supporters of the bill surrendered and withdrew it from consideration. . . .

The House of Representatives may devote its time to the perfecting of a great measure which also receives the approval of a majority of the Senate, and then the measure is to be overthrown, and the labors of the House brought to naught unless consent is given to engraft upon it the pet scheme of some individual Senator to which the great majority of both bodies may be opposed. As much can be said for the freedom of debate which exists in the Senate as for the summary procedure which often prevails in the House, under which a vote is taken upon most important measures with practically no debate at all. But unless a change of the Senate rule is made, as applied to new matters sought to be put upon bills which

[1] Samuel W. McCall, in *The Atlantic Monthly*, October, 1903. Reprinted by special permission.

have received in substance the approval of both Houses, the House of Representatives will be compelled to submit to the demands of individual Senators and accept the principle of government by unanimous consent instead of by majorities or see necessary legislation fail of passage. . . .

The constitution of the Senate was recognized, at the time of its establishment, as a violation of the democratic principle, but a violation which the peculiar conditions seemed to require, and I think it was never imagined that the inequality would not be limited to that which existed, or might grow out of the states at first forming the Union. While the Senate's constitutional powers have not changed, the course of events has greatly intensified their undemocratic character. The practical inequality originally was sufficiently bad, but, by the admission of so many new and small states, it has become almost intolerable. The original inequality bore heavily upon three states, yet was not essentially glaring with reference to the others; but to-day it is possible to select fifteen states having together in round numbers five millions of people, or about two-thirds of the population of the state of New York. The senatorial representatives of those five millions would lack only a single vote of the number necessary to defeat some great treaty which the Senators of the other seventy millions might support. States having less than one-sixth of the population choose a majority of the entire Senate, while more than five-sixths of the people of the country are represented by a minority in that body. The state of Nevada, under the last census, had less than forty-three thousand people. If New York were permitted to have the same proportional representation in the Senate, it would have some three hundred and fifty Senators. There are many things in the constitution of the Senate which are admirable. Such a conservative body is to-day of vital importance. The length of the term, the different method of choice from that of the Representatives, and the very gradual change in membership, are highly valuable features. But none of its good features grows out of the great inequality

of its constitution, giving one man in one section of the country the power of a hundred equally good men in another. . . .

We have had recent illustrations that this system of inequality does not merely violate our ideals, but that it has serious practical results. Ten years ago, in consequence of concessions to the silver mining interests, the country had reached the verge of the precipice, and our financial system was at last almost at the point of falling upon the silver standard. Under the law requiring the government to purchase 4,500,000 ounces of silver bullion every month, gold was rapidly leaving the treasury, while its vaults were groaning under the great mass of silver. The spectacle was then witnessed of Senators from states, containing mining camps but comparatively few people, almost holding the balance of power, and, having an equal voice with that of the populous commercial states of the Union, struggling desperately to continue the fatal policy of the government purchase of silver. It was only by the inflexible and heroic conduct of the President, supported, as he chanced to be, by the great body of the party in opposition to him, that the most vital commercial interests of the great majority of the people and the financial honor of the nation as well were not sacrificed.

Other illustrations might be given, but they would only tend to prove what is axiomatic—that the Senators from the small states, as well as the Senators from the large states, will, as a rule, vote for those measures furthering the special interests of the states they represent. They would, I think, be accused of betraying their trust if they did less.

The great practical encroachment of the power of the Senate beyond its fair constitutional limits is seen in connection with bills relating to taxation. The chief concession in the formation of the Constitution was that by which the large states were given at least the appearance of a special power over taxation in proportion to their population as a set-off against the great proportional powers given the small states through their equal representation in the Senate. The small states, however, on

the basis of population would possess entire equality with the large states, and it would certainly be no good ground for complaint that they should not be accorded the right to impose taxes for other people to pay. This compensating power is found in that clause of the Constitution providing that all bills for raising revenue shall originate in the House of Representatives, reserving to the Senate the right to propose or concur with amendments as on other bills. Unless a substantial power was intended to be conferred by this clause, the contemporary construction put upon it by *The Federalist*, in a paper written either by Madison or Hamilton, was strikingly erroneous. "Admitting, however," says the author of this paper, "that they should all be insufficient to subdue the unjust policy of the smaller states, or their predominating influence in the councils of the Senate, a constitutional and infallible recourse still remains with the larger states by which they will be able at all times to accomplish their just purposes. The House of Representatives can not only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse,—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representative of the people gradually enlarging the sphere of its activity and importance, and finally reducing, so far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."

But what would this power amount to if the imposition of a tax upon a single article would confer upon the Senate the right to go over the whole range of taxes and construct any sort of a bill it desired? By giving such an interpretation to the meaning of the exception, the great power itself is practically destroyed. At the time of the framing of the Constitution there was no such thing known as

amendment by complete substitution, and the fair construction of that clause, having reference to the conditions surrounding its adoption, is that if the House should send a bill to the Senate imposing a tax upon an article, the Senate might amend by raising or diminishing the proposed tax as it saw fit. It was such an abuse of the right of amendment as to destroy the power to originate taxation laws, when the Senate, as it did in 1872, substituted for a House bill relating to a tax on coffee a general revision of the tariff. The Senate's action at that time called out a protest from Garfield, who had deeply studied this subject, and who contributed to it one of the most notable efforts of his career in Congress. Garfield held that the action of the Senate in the case cited was an abuse, and that its action should be confined substantially to the subjects in the House bill. He declared that the action of the Senate invaded "a right which can not be surrendered without inflicting a fatal wound upon the integrity of our whole system of government." No hard and fast rule can be set up in such a case, but it is a question of prerogative, and each body should respect the constitutional prerogatives of the other. Surely the body representing the people should struggle for its own. . . .

83. *The Senate and Financial Measures*[1]

REVENUE BILLS

In view of the fact that it is impossible to estimate the needed revenues until near the close of the session on account of the delay and uncertainty as to the appropriation bills, the revenue bill must be brought in rather late. For the first session of the Sixty-fourth Congress the omnibus revenue bill was introduced into the House on July 1st. It was intended to raise $210,000,000 to supplement the permanent revenues, or, in other words, to meet an apparent deficit for the fiscal year ending June 30, 1917. It had already been drafted by the Ways and

[1] Charles W. Collins, *The National Budget System*, 77–78, 95–98 *passim*. Copyright, 1917, by The Macmillan Company. Reprinted by permission.

Means Committee after several months of labor and had been approved by the House Democratic Caucus. It was formally referred to the Ways and Means Committee and favorably reported out without change on July 5th. It was passed by the House the next day after a brief debate. It provided for taxation on incomes, inheritances, munition manufacturers, fermented liquors and wines and certain other products and occupations. It also placed a tariff on dyestuffs and provided for a tariff commission.

Certain amendments were forced on the floor of the House, chief among which were the following: Striking out the provision that no former member of Congress should be appointed to the tariff commission; the elimination of the provision laying a tax of one dollar per thousand capital on bankers; reducing the salaries of the members of the tariff commission from $10,000 to $7,500, and the secretary from $6,000 to $5,000, and striking out the item of $300,000 as the permanent annual appropriation for the support of the commission.

The bill then went to the Senate and was referred to the Finance Committee. On August 11th the Finance Committee referred it to the Democratic Caucus of the Senate with recommendations for certain amendments. On August 14th the Senate Caucus reached an agreement on the bill, having increased certain items, decreased some, and added several new provisions. Among the changes was the restoration of the item for $10,000 as the salary of each member of the tariff commission; changing the munitions tax from gross to net profits, with an estimated loss of $5,000,000 from the House provision; the elimination of the tax on telephone and telegraph messages, and freight and express receipts; an increase on the wine tax; and the addition of a provision for a corporation stock license tax. On August 31st an amendment was passed by the Senate providing against the "dumping" of foreign made goods into the American market. The bill was passed in the Senate on September 5th, sent to conference and ratified by both houses September 7th. Congress adjourned the next day. . . .

APPROPRIATION BILLS

It is the theory of our government that the House of Representatives should be the stronger of the two houses in the matter of financial legislation, and that the Senate should possess only a limited power of amendment. In the early period of our history this was true. But now the Senate is the predominant house even in money legislation both as to revenue and expenditure. No matter with what care the House prepares a bill it may be rewritten by the Senate. It is the tendency of the Senate to increase all appropriation bills. The House always disagrees to the amendments and asks for a conference but in the conference committee the Senate conferrees firmly insist on nearly all of their amendments and the House after protest finally agrees to the Senate increases.

Furthermore, practically unlimited debate is allowed in the Senate while in the House debate is limited according to the plans of the majority party—that is, the party responsible for the legislation. Under this procedure an appropriation bill may be disposed of in the House within a few hours if necessary, but when it reaches the Senate one or two hostile Senators may delay its passage indefinitely, and may even prevent its enactment into law. The entire debate on the estimates in the House of Commons is limited to twenty days with a proviso for three days additional.

Another feature connected with the legislative phase of our public finance, and which has received universal condemnation, is the practice known as "log-rolling." This is due to the fact that the members have a local rather than a national point of view. They are pressed by the local interests back at home. Their re-election may depend upon what profit their districts gain from the national government by virtue of their personal efforts. . . .

The matter does not stop with the House. It proceeds with even greater ease in the Senate where the legislative body is small and the individual influence and opportunity are great. Here the House often pays another

tribute to the powers of the Senate. A member of the House may have failed to secure the insertion of a much desired item in a bill in the House. He then goes to his Senator and gets him to insert that item in the bill. A number of the increases which the Senate habitually makes over the measure as it passed the House are due to this inter-log-rolling.

84. *Congress and its Critics*[1]

. . . In recent years the business of the Congress has increased many-fold in volume and vastly in the importance of many of the problems presented. If this business is to have proper consideration, the rules of both Houses of Congress must, while affording reasonable and even liberal opportunity for the expression of opinion and the presentation of views, contain provisions under which, when the matter in hand has been considered, it may be put to a vote.

Some critics of the Congress have been inclined to the view that the rules of the House governing debate are not sufficiently liberal. Ordinarily there is no disposition unduly to limit discussion of the question at issue when it is proceeding in good faith; and the rules are none too drastic when the minority under competent leadership starts a filibuster. The Senate with its small membership may never adopt, and perhaps should not adopt, rules under which debate may be limited to the extent possible under the House rules; but careful students of American legislation must admit that the present situation in the Senate with regard to debate is intolerable. In the consideration of treaties and other matters having to do with foreign relations, in which the jurisdiction of the Senate is exclusive, it may be wise and proper to continue the present rule of procedure in the Senate, though even that may be somewhat doubtful. The important matter, however, is the limitation of debate on legislative questions.

The relations between the Executive and the Congress

[1] Hon. Frank W. Mondell, "What's the Matter with Congress?" *The American Review of Reviews*, July, 1923. Reprinted by permission.

and the proper attitude of one toward the other have been matters of endless discussion, developing wide differences of opinion, since the beginning of our history. When things are not going to suit it, one section or another of the press bewails the lack of a "strong and forceful" Chief Executive who would tell the Congress what to do and insist upon its doing it. On the other hand, we have at certain periods in our history heard much of the alleged subserviency of the Congress to the Executive. Just how a President would get along in these days who might attempt to "boss" the Congress and make a business of telling it just what should and should not be done, I am not entirely certain. Under peace conditions no President in our time has attempted it, and therefore we have no actual experience on which to base an opinion.

It is said that President Wilson exercised a dominating influence over the Congress and compelled action according to his way of thinking. It is entirely true that during the period of the war and immediately thereafter, when we were living amid war-born conditions, Congress did accept in a large measure, though frequently with material amendment, the program of the Executive branch of the government; but Congress was not responding to President Wilson's demands nor to those of the members of his Cabinet, but to the overwhelming national patriotic impulse under which it gave the benefit of the doubt to anything and everything urged by those in administrative authority as essential to the accomplishment of the great enterprise in which we were engaged. In cases where the majority halted or hesitated, the minority forced the issue. . . .

To-day, with a vastly improved mail service and a disposition to use it, universal telegraph and telephone systems, the Representative or Senator is within easy reach of all who may desire to communicate with him. This is the day of organization and organized propaganda, and the legislator is fairly submerged with suggestions, requests, appeals, and demands for or against a perfectly bewildering variety of legislative proposals. Time was when many constituencies seemed to take pride in an in-

dependent spirit on the part of their representatives, but in these days of easy communication, cheap printing and flowing oratory, the member or Senator who feels called upon to take a decided stand in opposition to any of the plans and purposes of these organized minorities, finds himself confronted with a serious situation when he returns home. Modern militant minorities have no patience with or toleration of those who do not agree with their most extreme demands. . . .

Such good judges of Congressional requirements as the late Champ Clark and "Uncle Joe" Cannon have declared that the most essential qualification for a modern legislator is moral courage. These veterans voiced the general opinion among men experienced in legislative affairs. It does require moral courage of the finest quality to discharge in full measure, to the best interest of all the people, the responsibilities now laid upon a member of the Congress. . . .

We need a revival of the old-time spirit and attitude toward government; the attitude of service and support rather than one of appeal and pleading on behalf of groups, interests or causes. We need a revival of the spirit which rewarded fidelity, duty, unwavering courage and reasonable independence of view and action.

While we shall never have a Congress free from criticism so long as men's opinions differ, we may have one that more nearly meets the public's reasonable expectations when the great body of the people, who have no special axes to grind, no special interest to serve, shall take the time to inform themselves and, being informed, give their support to those who have the courage of their convictions and who do not hesitate to oppose questionable plans, purposes and proposals, however appealing and popular. . . .

CHAPTER XXVII

BUDGETARY REFORM

The United States for many years had little interest in developing an adequate system of administering its financial affairs. With the exception of a few years when the burdens of the Civil War were severely felt, taxation was relatively light. The wealth of the country grew rapidly and people were naturally careless as to the methods followed by their representatives in Congress, in State legislatures, and in local governing bodies as well.

From 1880 to 1910 few efforts at reform were made. Congress handled revenue and appropriation measures in a manner calculated to promote extravagance and irresponsibility. States and congressional districts scrambled for appropriations from the Federal Treasury, organized minorities threatened political reprisals unless their demands were gratified, and the committee system through which financial business was handled gave easy opportunity to apply the necessary pressure. The British Parliament had long ago restricted the introduction of appropriation and revenue measures to the responsible Executive, thus centralizing responsibility, permitting the balancing of income and expenditure, and insuring, for the most part, the rejection of the most selfish and extravagant demands.

The growing burden of taxation, coupled with increasing pressure for Federal aid from all kinds of organized interests, led to an active movement for reform of the existing system. The tremendous expenditures due to the World War at last forced action, and in 1921 a Federal budget system was inaugurated under congressional authority. The improvements resulting therefrom are described below, but it should be pointed out that the system still lacks some of the merits of the British plan. It is doubtful, however, whether they are attainable under the limitations imposed by the principle of separation of powers under which our government was organized.

On a smaller scale the States have been confronted with the same problems as the National Government. Waste and bad management have been even more pronounced. In many States the governor was empowered to veto items in appropriation bills, a check which has often proved useful but seldom wholly effective. Maryland in 1916 adopted a budget amendment which represents the greatest advance thus far made in this country in the direction of a responsible and business-like handling of the problem.

85. *Division of Responsibility in Congress* [1]

The method of dealing with public moneys in the United States has never at any time proven satisfactory. . . .

Some of these weaknesses may be summarized and labelled. There is one which permeates the whole procedure from beginning to end and that is lack of unity. It is impossible to get a complete view of our annual finances at any stage. At no time prior to the annual report of the Secretary of the Treasury, five months after the money has been entirely spent and the accounts audited and closed, can any one see at one time and in one place a balance sheet showing all of the appropriations and all of the revenues. . . .

In the preparation of financial measures there is complete lack of unity and cohesion. There is no financial policy on which to base a program. The estimates transmitted to Congress through the office of the Secretary of the Treasury are made by a large number of independent bureaus, offices, commissions and departments each having in view only its own needs. There is no executive authority in the President or otherwise to co-ordinate or revise them by way of reducing them to a business program for which the executive could be held responsible. This undigested mass of requests for money—now more than a thousand printed pages—goes to Congress to form, theoretically, the basis for the appropriation acts.

The lack of unity in the method of legislation is still more striking. A number of committees, independent of each other, independent of the corresponding committee in the other house of Congress, independent of the revenue committee, and independent of the executive, draft the bills from time to time. Freedom of amendment is allowed on the floors of each house. An appropriation bill may be radically and fundamentally changed after the House committee having charge of it has spent months in its preparation. . . .

Under this system it is not possible to have what is

[1] Charles W. Collins, *The National Budget System* (1917), 88–92 *passim.* Copyright, 1917, by The Macmillan Company. Reprinted by permission.

known as balance in the budget. That is to say it is not possible to balance the needs of one department with those of another so that the work of the government would go forward according to a consistent plan of development. Likewise a lack of equilibrium between the expenditure and the revenue sides prevents the balancing of estimated revenue with estimated expenditure. When the government itself has no idea what it is going to spend until after the money has been appropriated it is futile to attempt a forecast of what demands will be made on the people by way of taxation.

Nobody in particular is responsible for the annual finances. Responsibility is scattered over the entire range of governmental organization and broken up into a number of detached sections. The Departments are not responsible to the Treasury or the President for their estimates, the committees of the two houses are not responsible to any central organization and the two houses themselves are responsible to the people only by localities. There has been a shifting of the blame for our finances from the executives to Congress, from the House to the Senate, from the committees to the floors of the two houses, from Congress to the executive and even from Congress to the people. Thus is the idea of responsibility reduced to an absurdity. . . .

86. *Digest of Budget and Accounting Act* [1]

TITLE I.—DEFINITIONS

Sec. 1 and 2. Defines terms used in the Act and makes its provisions applicable to all of the executive departments, independent commissions, boards, bureaus, offices, agencies, or other establishments of the Federal Government, including the municipal government of the District of Columbia, but excluding the Legislative Branch of the Government and the Supreme Court of the United States.

[1] From *The Congressional Digest*, November, 1922. Reprinted by permission. Full enactment, *United States Statutes at Large* XLII, 20. June 10, 1921.

TITLE II.—THE BUDGET

Sec. 201 provides that the President shall transmit to Congress on the first day of each regular session the Budget, which shall set forth in summary and in detail estimates of all moneys needed for the support of the Government for the coming fiscal year; estimates of all receipts of the Government for the coming fiscal year; estimates of receipts and expenditures for the fiscal year in progress; all essential facts relating to the public debt; and such other statements as in the opinion of the President may be necessary to show the financial condition of the Government of the United States.

Sec. 202 provides that if the estimated receipts for the coming fiscal year on the basis of existing laws appear insufficient to meet the total of expenditures recommended in the Budget, the President is required to recommend to Congress the steps to be taken to meet the estimated deficit. If, on the other hand, these estimated receipts exceed the total of estimated expenditures, the President is required to make such recommendations as in his opinion the public interests may require.

Sec. 203 provides for the transmission of supplemental or deficiency estimates by the President to Congress. These require a statement from the President explaining their omission from the Budget.

Sec. 204 provides that the first Budget submitted by the President shall follow the general form of the old Book of Estimates theretofore submitted to Congress by the Secretary of the Treasury.

Sec. 205 provides that the President, on the same day that he transmits the Budget in December 1921, shall also transmit to Congress for the fiscal year 1923 only "an alternative budget," which shall be prepared in such form and according to such a system of scientific classification as may, in the opinion of the President, seem desirable.

Sec. 206 prohibits any officer or employee of any department of the Government from submitting to Congress a request for an appropriation, except at the request of either House of Congress.

Sec. 207 creates the Bureau of the Budget in the Treasury Department and provides for the appointment by the President (without confirmation by the Senate) of a Director and an Assistant Director at salaries of $10,000 and $7,500 a year respectively. It provides that the Bureau shall have authority, "under such rules and regulations as the President may prescribe," to prepare the Budget for the President (and the alternative budget) and "to assemble, correlate, revise, reduce or increase the estimates of the several departments or establishments." . . .

Sec. 209 authorizes the President to use the Bureau of the Budget to make investigations, with a view to economy and efficiency in the public service, with reference to the organization, activities, and business methods of the departments, the appropriations therefor, or the regrouping of services.

Sec. 210 provides that the Bureau shall prepare for the President a codification of all laws relating to reports of receipts and expenditures and to the estimates of appropriations, in order that the President may recommend to Congress what changes, in his opinion, should be made in them. . . .

Sec. 212 provides that the Bureau shall, upon request, furnish information to Congress.

Sec. 213 authorizes the officials of the Bureau, under regulations of the President, to have access to all necessary information which may be in the possession of any department or establishment.

Sec. 214 provides for the appointment by the head of each department and establishment of a "budget officer," who is required to prepare their respective estimates.

Sec. 215 provides for study and revision of the estimates by the heads of the departments and establishments before their transmission to the Bureau of the Budget on or before September 15th of each year.

Sec. 216 authorizes the President to prescribe the form, manner, and detail of the estimates as submitted to the Bureau of the Budget.

TITLE III.—GENERAL ACCOUNTING OFFICE

Sec. 301 creates the General Accounting Office, makes it independent of the executive departments, and puts it under the control and direction of the Comptroller General of the United States. The offices of the Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, and the remaining offices and employees of the Comptroller of the Treasury and the books, records, furniture, etc., are transferred to the General Accounting Office.

Sec. 302 creates the offices of the Comptroller General and Assistant Comptroller General of the United States, to be appointed by the President with the advice and consent of the Senate at salaries of $10,000 and $7,500 a year respectively.

Sec. 303 provides that the Comptroller General and the Assistant Comptroller General shall each hold office for 15 years. The Comptroller General is not eligible for reappointment. Neither of these officials can be removed from office by the President, but may be removed only by Joint Resolution of Congress after notice and hearing on the grounds of permanent incapacity, inefficiency, neglect of duty, malfeasance in office, or of any felony or conduct involving moral turpitude "and for no other cause and in no other manner except by impeachment." Once removed from office they are not eligible for reappointment. They must retire from office at the age of 70 years. . . .

Sec. 312. The Comptroller General shall investigate all matters relating to the receipt and disbursement of the public funds and report to Congress each session such facts and recommendations as he may deem advisable. He is required specially to report every expenditure or contract made by any department or establishment in any year in violation of law. He is also required to furnish to the Bureau of the Budget information relating to expenditures and accounting.

87. *The Budgetary Reforms of* 1921[1]

. . . This, in exceedingly brief compass, is the system, or lack of system, under which the national government for a hundred and thirty years had been attempting to handle its financial affairs. The "Budget and Accounting Act, 1921" adopted June 10, 1921, in conjunction with a revision of the House and Senate Rules governing the handling of appropriation bills, changed all this. Its provisions are of the most revolutionary character in that it threw this entire system into the discard and established in its place a system of financial administration that can compare favorably with that of any other nation. Not one of the defects of the old system that have been enumerated but that it corrects or lays the basis for correction.

First, and most important of all, it definitely installs the President into the new position of general manager of the government as a business organization. This necessarily followed from the fact that, under the new act, Congress will look to the President alone for the formulation of a financial and work program and will look to him primarily for the efficient execution of such plans as may be adopted. In point of fact the President, immediately upon the entering into force of the new act, assumed the reins of office, called together in formal meeting all of the chief administrative officers and let it be known that thereafter their relations both in formulating requests for appropriations and in expending funds granted should be direct to him and that his wishes in respect to administrative policies should prevail. That this was not a mere gesture was shown by the demand that he then made that all the spending services should so conduct their affairs that, not only would the need of deficiency appropriations be avoided, but that a surplus would be realized to be covered back into the treasury, as an aid to meeting a deficit in operations of the year in progress that was threatening.

[1] W. F. Willoughby, "National Financing—The Old Way and the New," *The Congressional Digest*, November, 1922. Reprinted by permission.

Secondly, in the Bureau of the Budget, for which provision was made by the act, the President was given an agency through which he could meet his new obligations as commander-in-chief of the administrative forces.

Thirdly, the act provided that beginning with the next fiscal year and thereafter, the President should on the first day of each regular session submit to Congress a "Budget" which should, by means of balanced statements, set forth the assets and liabilities of the treasury, the receipts and expenditures of the government during the last completed year, the estimated receipts and expenditures during the year in progress and his expenditure and revenue proposals for the year to come. In pursuance of this, the President, for the first time in our history, has been made responsible for giving a complete account of his stewardship as head of the administration and of bringing before Congress and the people his financial and work program. . . .

Fourthly, Congress, appreciating that it must do its share toward making the new system a success, reformed its whole system for the handling of appropriations by providing that entire jurisdiction over appropriation proposals should, in each house, be vested in a single committee and that the appropriation bills should follow the classification of items employed in the budget, under which all items for a department or service are brought together in one place under a single head. As a result of this each of the houses has brought before it at one time and in the same bill the entire provision that is proposed for each of the great departments and branches of the government. No longer does it have to consider the matter of voting funds for the maintenance of our military or naval establishment or any other of our great administrative services at a number of different times and on the basis of recommendations made by a number of different committees and embodied in a number of different bills.

Finally, through the creation of the independent office of Comptroller General, Congress has provided, not merely for an audit of expenditures by an officer in-

dependent of the administrative branch and reporting directly to it, but one that shall furnish to Congress information regarding the manner in which the spending services have exercised the responsibilities imposed upon them and the steps that should be taken to secure a more efficient application of public funds. Thus the act provides that the Comptroller General shall annually submit to Congress a report regarding not only the work of his office by "containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement and application of public funds as he may think advisable. In such annual report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy and efficiency in public expenditures." . . .

No one can claim that the new budget system is a cure-all. That it lays the basis for an efficient and economical administration of public affairs such as the country has never before enjoyed and itself has contributed powerfully to that end cannot, however, be doubted.

88. *The Maryland Budget System*[1]

The General Assembly shall not appropriate any money out of the Treasury except in accordance with the following provisions:

Sub-Section A: Every appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill, as hereinafter mentioned.

Sub-Section B: First. Within twenty days after the convening of the General Assembly (except in the case of a newly elected Governor, and then within thirty days after his inauguration), unless such time shall be extended by the General Assembly for the session at which the budget is to be submitted, the Governor shall submit to the General Assembly two budgets, one for each of the ensuing fiscal years. Each budget shall contain a

[1]Constitution of Maryland, Article III, Section 52. Ratified November 7, 1916.

complete plan of proposed expenditures and estimated revenues for the particular fiscal year to which it relates; and shall show the estimated surplus or deficit of revenues at the end of such year. Accompanying each budget shall be a statement showing: (1) the revenues and expenditures for each of the two fiscal years next preceding; (2) the current assets, liabilities, reserves and surplus or deficit of the State; (3) the debts and funds of the State; (4) an estimate of the State's financial condition as of the beginning and end of each of the fiscal years covered by the two budgets above provided; (5) any explanation the Governor may desire to make as to the important features of any budget and any suggestion as to methods for reduction or increase of the State's revenue.

Second. Each budget shall be divided into two parts, and the first part shall be designated "Governmental Appropriations" and shall embrace an itemized estimate of the appropriations: (1) for the General Assembly as certified to the Governor in the manner hereinafter provided; (2) for the Executive Department; (3) for the Judiciary Department, as provided by law, certified to the Governor by the Comptroller; (4) to pay and discharge the principal and interest of the debt of the State of Maryland in conformity with Section 34 of Article III of the Constitution, and all laws enacted in pursuance thereof; (5) for the salaries payable by the State under the Constitution and laws of the State; (6) for the establishment and maintenance throughout the State of a thorough and efficient system of public schools in conformity with Article VIII of the Constitution and with the laws of the State; (7) for such other purposes as are set forth in the Constitution of the State.

Third. The second part shall be designated "General Appropriations," and shall include all other estimates of appropriations.

The Governor shall deliver to the presiding officer of each House the budgets and a bill for all the proposed appropriations of the budgets clearly itemized and classified; and the presiding officer of each House shall promptly cause said bill to be introduced therein, and such bill shall

be known as the "Budget Bill." The Governor may, before final action thereon by the General Assembly, amend or supplement either of said budgets to correct an oversight or in case of an emergency, with the consent of the General Assembly by delivering such an amendment or supplement to the presiding officers of both Houses; and such amendment or supplement shall thereby become a part of said Budget Bill as an addition to the items of said bill or as a modification of or a substitute for any item of said bill such amendment or supplement may effect.

The General Assembly shall not amend the Budget Bill so as to affect either the obligations of the State under Section 34 of Article III of the Constitution, or the provisions made by the laws of the State for the establishment and maintenance of a system of public schools, or the payment of any salaries required to be paid by the State of Maryland by the Constitution thereof; and the General Assembly may amend the bill by increasing or diminishing the items therein relating to the General Assembly, and by increasing the items therein relating to the judiciary, but except as hereinbefore specified, may not alter the said bill except to strike out or reduce items therein, provided, however, that the salary or compensation of any public officer shall not be decreased during his term of office; and such bill when and as passed by both Houses shall be a law immediately without further action by the Governor.

Fourth. The Governor and such representatives of the executive departments, boards, officers and commissions of the State expending or applying for State's money, as have been designated by the Governor for this purpose, shall have the right, and when requested by either House of the Legislature, it shall be their duty to appear and be heard with respect to any Budget Bill during the consideration thereof, and to answer inquiries relative thereto.

Sub-Section C: Supplementary Appropriation Bills:— Neither House shall consider other appropriations until the Budget Bill has been finally acted upon by both Houses, and no such other appropriation shall be valid

except in accordance with the provisions following: (1) Every such appropriation shall be embodied in a separate bill limited to some single work, object or purpose therein stated and called herein a Supplementary Appropriation Bill; (2) Each Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be laid and collected as shall be directed in said bill; (3) No Supplementary Appropriation Bill shall become a law unless it be passed in each House by a vote of a majority of the whole number of the members elected; and the yeas and nays recorded on its final passage; (4) Each Supplementary Appropriation Bill shall be presented to the Governor of the State as provided in Section 17 of Article II of the Constitution and thereafter all the provisions of said Section shall apply.

Nothing in this amendment shall be construed as preventing the Legislature from passing at any time in accordance with the provisions of Section 28 of Article III of the Constitution and subject to the Governor's power of approval as provided in Section 17 of Article II of the Constitution an appropriation bill to provide for the payment of any obligation of the State of Maryland within the protection of Section 10 of Article I of the Constitution of the United States.

Sub-Section D: General Provisions:—First. If the Budget Bill shall not have been finally acted upon by the Legislature three days before the expiration of its regular session, the Governor may, and it shall be his duty to issue a proclamation extending the session for such further period as may, in his judgment, be necessary for the passage of such bill; but no other matter than such bill shall be considered during such extended session except a provision for the cost thereof.

Second. The Governor for the purpose of making up his budgets shall have the power, and it shall be his duty, to require from the proper State officials, including herein all executive departments, all executive and administrative offices, bureaus, boards, commissions and agencies expending or supervising the expenditure of, and all in-

stitutions applying for State moneys and appropriations, such itemized estimates and other information, in such form and at such times, as he shall direct. The estimates for the Legislative Department, certified by the presiding officer of each House, of the Judiciary, as provided by law, certified by the Comptroller, and for the public schools, as provided by law, shall be transmitted to the Governor, in such form and at such times as he shall direct, and shall be included in the budget without revision.

The Governor may provide for public hearings on all estimates and may require the attendance at such hearings of representatives of all agencies, and of all institutions applying for State moneys. After such public hearings he may, in his discretion, revise all estimates except those for the legislative and judiciary departments, and for the public schools as provided by law.

Third. The Legislature may, from time to time, enact such laws not inconsistent with this Section, as may be necessary and proper to carry out its provisions.

Fourth. In the event of any inconsistency between any of the provisions of this Section and any of the other provisions of the Constitution, the provisions of this Section shall prevail. But nothing herein shall in any manner affect the provisions of Section 34 of Article III of the Constitution or of any laws heretofore or hereafter passed in pursuance thereof, or be construed as preventing the Governor from calling extraordinary sessions of the Legislature, as provided by Section 16 of Article II, or as preventing the Legislature at such extraordinary sessions from considering any emergency appropriation or appropriations.

If any item of any appropriation bill passed under the provisions of this Section shall be held invalid upon any ground, such invalidity shall not affect the legality of the bill or of any other item of such bill or bills.

CHAPTER XXVIII

GOVERNMENT BY INJUNCTION

The Constitution charges the President "to take care that the laws be faithfully executed." Throughout the greater part of our constitutional history this clause has not been interpreted as a grant of power; but it was used, under exceptional circumstances, by President Lincoln as a justification for coercive measures within the seceding States, and, again under exceptional circumstances, was held by the Supreme Court in the Neagle Case (135 U. S. 1, 1890) to give the Executive Department affirmative powers, by way of protecting its own agents and officials. In general, the exercise of executive authority has been based upon congressional legislation.

But the Federal courts have another powerful weapon for use in enforcement of Federal law, the injunction, a writ issued by a court of equity, commanding those to whom it is directed to refrain from doing any acts specified therein. Disobedience involves summary punishment for "contempt of court," ordinarily without the intervention of a jury. Access to the equity courts is open to the executive to restrain activities in violation of Federal laws, and likewise to the individual, in cases where "irreparable damage" may be done unless this machinery of "preventive justice" be invoked. An injunction issued by a Federal court is enforced by the United States marshal, backed up, if necessary, by the military resources of the nation, though, of course, the military will not be called upon except in extreme cases.

When interstate commerce and the carriage of the mails were obstructed by striking railroad employees who defied the injunction issued by Judge Grosscup, President Cleveland sent troops into Chicago to restore order and permit the operation of the trains. In the Debs decision the Supreme Court upheld the legality both of the President's action and the imprisonment for contempt of court of the responsible leaders. The affair, however, was the source of considerable apprehension to many authorities in jurisprudence and political science who regarded the use of the injunction as an invasion of rights guaranteed by the Constitution.

89. In re *Debs*[1]

Mr. Justice Brewer . . . delivered the opinion of the court.

The case presented by the bill is this: The United States, finding that the interstate transportation of per-

[1]Supreme Court of the United States, 1895. 158 United States, 564.

sons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are presented: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as to authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in governmental affairs implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty?

First. What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enumerated powers, acts directly upon the citizen, and not through the intermediate agency of the State. . . .

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post office system for the nation. . . . [Here follows a consideration of the statutes passed in the exercise of these powers.]

Obviously these powers given to the national government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact

that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: "The trial of all crimes except in cases of impeachment shall be by jury; and such trial shall be held in the State where the said crime shall have been committed." If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known, and the national government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the nation in these respects

would be at the absolute mercy of a portion of the inhabitants of that single State.

But there is no such impotency in the national government. The entire strength of the nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which the rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. . . .

It is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law. . . .

The law is full of instances in which the same act may

give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages, and the same is true of all other offenses which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. So here, the acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings. The complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights. If any criminal prosecution be brought against them for the criminal offenses alleged in the bill of complaint, of derailing and wrecking engines and trains, assaulting and disabling employees of the railroad companies, it will be no defense to such prosecution that they disobeyed the orders of injunction served upon them and have been punished for such disobedience.

Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that "it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts," and we reaffirm the declaration made for the court by Mr. Justice Bradley in Boyd *v.* United States, 116 U. S. 616, 635, that "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*" But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have

the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. . . .

In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.

Further, it is said by counsel in their brief:

"No case can be cited where such a bill in behalf of the sovereign has been entertained against riot and mob violence, though occurring on the highway. It is not such fitful and temporary obstruction that constitutes a nuisance. The strong hand of executive power is required to deal with such lawless demonstrations.

"The courts should stand aloof from them and not invade executive prerogative, nor even at the behest or request of the executive travel out of the beaten path of well-settled judicial authority. A mob cannot be suppressed by injunction; nor can its leaders be tried, convicted, and sentenced in equity.

"It is too great a strain upon the judicial branch of the government to impose this essentially executive and military power upon courts of chancery."

We do not perceive that this argument questions the jurisdiction of the court, but only the expediency of the action of the government in applying for its process. It surely cannot be seriously contended that the court has jurisdiction to enjoin the obstruction of a highway by one person, but that its jurisdiction ceases when the obstruction is by a hundred persons. It may be true, as suggested, that in the excitement of passion a mob will pay little heed to processes issued from the courts, and it may be, as said by counsel in argument, that it would savor somewhat of the puerile and ridiculous to have read a writ of injunction to Lee's army during the late Civil War. It is doubtless true that *inter arma leges silent*, and in the throes of rebellion or revolution the processes of civil courts are of little avail, for the power of the courts rests on the general support of the people and their recog-

nition of the fact that peaceful remedies are the true resort for the correction of wrongs. But does not counsel's argument imply too much? Is it to be assumed that these defendants were conducting a rebellion or inaugurating a revolution, and that they and their associates were thus placing themselves beyond the reach of the civil process of the courts? . . .

Whatever any single individual may have thought or planned, the great body of those who were engaged in these transactions contemplated neither rebellion nor revolution, and when in the due order of legal proceedings the question of right and wrong was submitted to the courts, and by them decided, they unhesitatingly yielded to their decisions. The outcome, by the very testimony of the defendants, attests the wisdom of the course pursued by the government, and that it was well not to oppose force simply by force, but to invoke the jurisdiction and judgment of those tribunals to whom by the Constitution and in accordance with the settled conviction of all citizens is committed the determination of questions of right and wrong between individuals, masses, and States. . . .

The petition for a writ of *habeas corpus* is *Denied.*

90. *"Government by Injunction"* [1]

. . . The courts in America, and especially the federal courts, have shown a disposition to extend their powers beyond any limits heretofore recognized. In seeking to restrain acts in their nature purely criminal, and in punishing by summary proceedings for contempt persons accused of committing those acts, they have been charged with usurping the functions of the criminal law; in seeking to restrain all persons, whether parties to the suit or not, and whether identified or not, they have been charged with issuing decrees legislative rather than judicial. The case of the United States *v.* Debs, above referred to, furnishes an example of both these alleged usurpations of power. From the approval given by the Supreme Court of the United States to the in-

[1] William H. Dunbar, in *The Law Quarterly Review*, October, 1897.

junction there issued, the case is likely to become a precedent of great weight. It may fitly be taken as typical of the most extreme exercise of equity powers in these respects. If the course there followed can be supported, the principles of equity jurisprudence have received an important extension which may render "government by injunction" more than a mere epithet.

The preliminary injunction issued in the case of United States *v.* Debs enjoined certain defendants named in the bill, "and all persons combining and conspiring with them, and all other persons whomsoever," absolutely to refrain and desist from certain acts, among others "from in any way or manner interfering with, hindering, obstructing, or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce or carrying freight or passengers between or among the States; . . . and from in any manner interfering with, injuring, or destroying any of the property of any of said railroads engaged in or for the purposes of, or in connection with, interstate commerce, or the carriage of the mails of the United States, . . . and from injuring, destroying, or in any way interfering with, any of the signals or switches of any of said railroads"; and from using threats, intimidation, force or violence to induce employees to quit the service of the railroads or to prevent persons from entering the employ of the railroads. This injunction, it was ordered, should be in force as to all persons not named in it from the time they severally had knowledge of it. Informations for contempt were subsequently filed against certain of the defendants named as parties to the suit, and also against other persons not mentioned in the bill or injunction, all of whom with one exception were convicted and punished. The acts charged against the defendants in the informations were continuing in defiance of the injunction to order strikes and initiate violence and disorder, and thereby causing great destruction of property and loss of many lives.

The injunction thus sought to restrain the commission of acts of violence which would be flagrant breaches of

public order and serious criminal offenses; acts which the ordinary machinery of police administration would, if possible, prevent by physical interference and punish with heavy penalties if committed. It sought further to restrain all persons whomsoever from committing any of those acts. Not only did a court of equity therefore undertake by its process to grant a cumulative remedy for that which the criminal law already covered, but it undertook to make its decree co-ordinate in extent with the existing legislative prohibitions. The persons not named in the bill against whom the injunction was directed were not specific individuals unknown by name but otherwise identified; they were all persons who might thereafter engage in the acts specified in the injunction. In like manner the prohibition was not directed against specific threatened acts of interference with the operation of the railroads, but against all acts of that character that might thereafter be contemplated by all persons. . . .

The sweeping terms of the injunction issued in the Debs case as to the persons to whom it was addressed are no less significant than the nature of the acts enjoined. It has already been mentioned that the bill was filed against certain named defendants. A subpœna in regular form was addressed to and served upon these individuals. The injunction issued was also addressed to these persons, but it purported to restrain in addition "all persons combining and conspiring with them, and all other persons whomsoever." The informations for contempt of this injunction were filed not only against persons named as defendants, but against others not named in the bill, who were also charged with doing acts in violation of the order of the court. The record does not even show that these individuals, not parties to the bill, fell within the description of persons combining and conspiring with the named defendants. It must be assumed from the terms of the order that the court intended to restrain such persons although acting independently, and that it punished them as such independent actors. We have therefore to consider the proposi-

tion that a court of equity may *ex parte*, upon the motion of a plaintiff, issue an order restraining all persons from doing specified acts, although such persons are not parties to the cause, are in no way connected with the parties, are not identified in any way, and cannot be identified except by the fact of their violating the injunction. Such a course if justifiable marks, it is believed, an important departure from the rules of procedure that have heretofore prevailed in chancery. . . .

Courts of equity, like courts of law, are established for the determination of controversies between individuals. The power to issue preliminary injunctions is incidental to the power of determining such controversies. The right to lay down general rules for the government of the community, to declare *ex cathedra*, in advance of any contentious proceedings in which the question arises, what may and what may not lawfully be done, to impose on the whole community a duty to refrain from doing a certain act, is in its nature a legislative right. The jurisdiction of every court depends upon the existence of a cause in which it is called upon to adjudicate. Except in the instances of courts created to decide actions *in rem* the scope of the jurisdiction is limited to the persons who are actually or constructively before the court. By legislative enactments the constitutionality of which has been doubted, but may here be conceded, courts of equity have, in some instances, been authorized after notice by publication to make decrees binding upon all the world, establishing certain facts as to property; but such decrees are supported only by the legislative power authorizing them. In the absence of statutory provisions the jurisdiction of equity is wholly *in personam*, and can be exercised only against those persons who are parties to the litigation. A party to the suit is brought before the court by the service of process. In the case of a preliminary injunction issued *ex parte* service of the injunction is a service of process. The injunction is an order of the court addressed to the individual, and the individual is one between whom and the plaintiff the controversy exists. When, however, such an injunc-

tion is issued, addressed to "all persons whomsoever," it can in no sense be said that an individual not named or described in the bill as a party to the suit becomes a party upon having notice of the order. If such an individual is not in fact engaged in the acts sought to be restrained, there is no pretense for saying that a controversy exists between him and the plaintiff. Such a controversy may arise if he subsequently engages in the acts complained of, but it is difficult to conjecture how by reason of such a subsequent act he can be deemed to have been a party to the controversy at an earlier time. It has never, it is believed, been contended that the final decree of a court of equity was binding upon persons not parties to the suit, and not claiming under persons who were parties. It is certainly anomalous that an interlocutory order of the court should be given a force which the final decree cannot have. If an injunction restraining the defendant and "all persons whomsoever" from going upon the plaintiff's land were made perpetual, would one, not a party to the suit but having notice of the decree, who claimed a right of way over the land, be in contempt for thereafter using his alleged easement? If not, how can it be said that by the same act such a person would be in contempt of a preliminary injunction in the same terms? The test cannot be the actual existence of the right asserted, for the very object of the suit is to determine that right, and it is a fundamental principle that violation of an injunction is not excused, however erroneously or improvidently the decree may have been made, provided the court had jurisdiction. Nor can the test be whether the act enjoined is a crime as well as a civil wrong, unless the doctrine is to be asserted that equity interferes to prevent the commission of criminal acts because they are criminal, and not merely because and when they are invasions of rights of property. . . .

The strong repugnance which every law-abiding citizen must feel for acts of lawlessness renders the task of criticizing proceedings designed to preserve order somewhat invidious. None of the persons who have been punished

for contempt in violating injunctions such as have been discussed here have been worthy of any personal sympathy. The chivalry of supporting fellow-workmen in a contest with employers ceases to excite admiration when it is directed to the wanton destruction of property and to mob violence. Debs, who for a time posed as supreme arbiter over the welfare of millions of his fellow-citizens, was in fact taken red-handed in a flagrant and audacious defiance of the laws, and merited the most severe punishment which the penal statutes authorized. But for the very reason that law and order were thus outraged, it was the more necessary to see that the measures of repression used were fully warranted. It is no light matter that suspicion even should rest upon the judiciary of warping principles to meet the supposed exigencies of cases as to which the strongest passions of the community are aroused.

The power of courts to punish by summary proceedings for contempt all persons who obstruct the administration of justice or disobey the lawful orders of the court has often been described as the most unrestrained power exercised in our system of government. Such matters are tried by the court itself and without any right of appeal for error of fact or law. This power is absolutely essential to the efficient administration of justice. It behooves the judiciary, therefore, not only to exercise it with discretion, but to avoid extensions of jurisdiction which may lead to the necessity of exercising this power in matters properly cognizable by the courts of criminal law and by a jury. A community in which the jury system is still preserved and regarded as a bulwark of liberty will not tolerate encroachments on the part of courts of equity by which, in those very cases in which a large part of the community is most disposed to rely upon the jury as a check upon the supposed partiality of the courts, the process of punishment by contempt is made to take the place of trial by jury. The machinery essential to the ordinary working of the courts is in danger of being wrecked by its use in such extraordinary emergencies.

It is strangely inconsistent with established principles

that courts of equity should take jurisdiction in order to prevent the ultimate issues being tried by a jury; that they should grant injunctions which appear, at least, to be designed primarily as a means of drawing to the court power to punish by proceedings for contempt acts which should have been prevented by the executive authorities and should be punished by the criminal law. A preliminary injunction granted not as an incident to a controversy between individuals, not seeking to restrain a defendant until the rights between him and the plaintiff can be ascertained, not acting upon known persons to prevent them from doing certain acts, but seeking to throw the ægis of the court over certain property so as to protect it from all persons whatsoever, is of itself an anomaly in chancery procedure. When such an injunction is granted under circumstances which preclude the possibility of its enforcement except by assuming the duty lodged with the executive of preserving public order, and apparently largely for the purpose of assuming that duty, it presents a serious menace to the very framework of the government.

The Supreme Court of the United States has given its great authority in support of the course pursued in the Debs case. Other courts have unhesitatingly followed the doctrines thus laid down. The weight of authority in America appears at present to be overwhelmingly in favour of this extreme exercise of the power of equity. Many public writers have applauded the action of the federal courts in interfering by injunction where the local authorities were supine or secretly in sympathy with the criminals. But such a departure from principle cannot properly be permitted to pass unchallenged. It should not be forgotten that no course is more dangerous than to justify the exercise of a doubtful power by the supposed necessities of a particular emergency. Courts must adhere to fixed principles, lest the departure justified to-day by a present emergency, itself justify to-morrow a departure inspired by some sinister motive. Courts of equity can in no event be made to replace permanently an able and honest administration of its duties by the

executive department of the government. The attempt to do so may seem to achieve a temporary success, but ultimately will result either in a lowering of the standard of the judiciary or a disregard of its decrees. To those who recall the lawlessness prevailing in Chicago during the strikes in 1894, the conception of a court of equity guarding by power of injunction the vast railroad properties in the city will seem almost grotesque and not far removed from the parallel suggested by counsel for Debs of issuing, during the Civil War, an injunction to stop the advance of Lee's army. The fear of proceedings for contempt did not prevent the burning of over a thousand freight cars and the loss of many lives. But if the practical utility of the course pursued could be demonstrated it would still, it is submitted, remain true that a procedure involving the issue by a court of equity of an edict binding upon all persons, enjoining acts already forbidden by statute or by common law, designed for the purpose of punishing all persons who should violate those prohibitions, thus reinforced by the decree of the court, would be an innovation upon the established course of equity procedure and jurisprudence such as legislative authority alone could justify.

CHAPTER XXIX

THE INJUNCTION IN LABOR DISPUTES

Labor disputes and their attendant problems are, in a majority of cases, matters under State jurisdiction. It is obvious, however, that the activities of labor organizations may interfere with interstate commerce. The position of the Federal courts in the Danbury Hatters Case established an important precedent. In this famous case the Supreme Court held that the United Hatters of America, by the use of the primary and secondary boycott and other means, had conspired and combined to restrain unlawfully the interstate trade of hat manufacturers in Danbury, Connecticut.

The decision gave great offense to organized labor and the leaders of the American Federation of Labor began a campaign to secure relief by act of Congress. The original bill, incorporated in the Clayton Act as sections six and twenty, was hailed by Mr. Samuel Gompers as "Labor's Bill of Rights," although it was distinctly stated by the member of the House Committee in charge of the bill that it was not intended to legalize the secondary boycott. Congress was under great pressure from both capital and labor while the measure was under debate, and this probably accounts for the vagueness, if not ambiguity, of the final enactment. When, therefore, the Supreme Court gave a restrictive interpretation to the sections in question, there was a widespread feeling among labor interests that they had been defrauded of rights conferred by their legislative representatives. This was accompanied by the usual charge that the Supreme Court was an instrument of organized wealth. In 1922, interest in the injunction question was again aroused by the sweeping nature of the writ issued against the striking railroad shopmen. There has been renewed agitation for legislative restrictions on the power of the courts in such cases. It is worth noting, however, that in 1925 the constitutionality of the "jury trial clause" of the Clayton Act was upheld by the Supreme Court, reversing the decision of a lower court which had declared the provision unconstitutional as an interference with inherent judicial powers. (Michaelson *v.* United States, 266 United States, 42.) The provision for jury trial in certain cases of contempt is still too limited in scope, however, to satisfy the demands of the leaders of organized labor.

91. *The Use of the Injunction in America* [1]

. . . In America the injunction did not secure recognition as a possible remedy until 1888. When a few years

[1] Dissenting opinion of Mr. Justice Brandeis in Truax *v.* Corrigan, Supreme Court of the United States, 1921. 257 United States, 312.

later its use became extensive and conspicuous, the controversy over the remedy overshadowed in bitterness the question of the relative substantive rights of the parties. In the storms of protest against this use many thoughtful lawyers joined. The equitable remedy, although applied in accordance with established practice, involved incidents which, it was asserted, endangered the personal liberty of wage-earners. The acts enjoined were frequently, perhaps usually, acts which were already crimes at common law or had been made so by statutes. The issues in litigation arising out of trade disputes related largely to questions of fact. But in equity, issues of fact as of law were tried by a single judge, sitting without a jury. Charges of violating an injunction were often heard on affidavits merely, without the opportunity of confronting or cross-examining witnesses. Men found guilty of contempt were committed in the judge's discretion, without either a statutory limit upon the length of the imprisonment, or the opportunity of effective review on appeal, or the right to release on bail pending possible revisory proceedings. The effect of the proceeding upon the individual was substantially the same as if he had been successfully prosecuted for a crime; but he was denied, in the course of the equity proceedings, those rights which by the Constitution are commonly secured to persons charged with a crime.

It was asserted that in these proceedings an alleged danger to property, always incidental and at times insignificant, was often laid hold of to enable the penalties of the criminal law to be enforced expeditiously without that protection to the liberty of the individual which the Bill of Rights was designed to afford; that through such proceedings a single judge often usurped the functions not only of the jury but of the police department; that, in prescribing the conditions under which strikes were permissible and how they might be carried out, he usurped also the powers of the legislature; and that incidentally he abridged the constitutional rights of individuals to free speech, to a free press and to peaceful assembly.

It was urged that the real motive in seeking the in-

junction was not ordinarily to prevent property from being injured nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. In other words, that under the guise of protecting property rights, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the State on one side or the other according to principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its own; and that, pending the ascertainment of new principles to govern industry, it was wiser for the State not to interfere in industrial struggles by the issuance of an injunction. . . .

92. *The Clayton Act*[1]

Sec. 6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws. . . .

Sec. 20. No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to prop-

[1] *United States Statutes at Large*, XXXVIII, 730. October 15, 1914.

erty, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

93. *Duplex Printing Press Company* v. *Deering* et al.[1]

Mr. Justice Pitney delivered the opinion of the court. . . .

The facts of the case and the nature of the relief prayed are sufficiently set forth in the report of the decision of the Circuit Court of Appeals. . . . These may be summarized as follows: Complainant conducts his business on the "open-shop" policy, without discrimination against either union or non-union men. The individual defendants and local organizations of which they are the representa-

[1] Supreme Court of the United States, 1920. 254 United States, 443.

tives are affiliated with the International Association of Machinists, an unincorporated association having a membership of more than 60,000, and are united in a combination, to which the International Association also is a party, having the object of compelling complainant to unionize its factory and enforce the "closed shop," the eight-hour day, and the union scale of wages, by means of interfering with and restraining its interstate trade in the products of the factory. Complainant's principal manufacture is newspaper presses of large size and complicated mechanism, varying in weight from 10,000 to 100,000 pounds, and requiring a considerable force of labor and a considerable expenditure of time—a week or more—to handle, haul and erect them at the point of delivery. These presses are sold throughout the United States and in foreign countries; and, as they are especially designed for the production of daily papers, there is a large market for them in and about the City of New York. They are delivered there in the ordinary course of interstate commerce, the handling, hauling and installation work at destination being done by employees of the purchaser, under the supervision of a specially skilled machinist supplied by complainant. The acts complained of and sought to be restrained have nothing to do with the conduct or management of the factory in Michigan, but solely with the installation and operation of the presses by complainant's customers. None of the defendants is or ever was an employee of complainant, and complainant at no time has had relations with either of the organizations that they represent. In August, 1913 (eight months before the filing of the bill), the International Association called a strike at complainant's factory in Battle Creek, as a result of which union machinists to the number of about eleven in the factory, and three who supervised the erection of presses in the field, left complainant's employ. But the defection of so small a number did not materially interfere with the operation of the factory, and sales and shipments in interstate commerce continued. The acts complained of made up the details of an elaborate program adopted and carried out by defendants and their

organizations in and about the City of New York as part of a country-wide program adopted by the International Association, for the purpose of enforcing a boycott of complainant's product. The acts embraced the following, with others: warning customers that it would be better for them not to purchase, or, having purchased, not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers, in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being blacklisted as "scabs" if they assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, handling, or installing the presses. In some cases the threats were undisguised; in other cases polite in form, but none the less sinister in purpose and effect. . . .

That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right, entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce is necessary for the successful conduct of the business; that a widespread combination exists, to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate trade and commerce by the means that have been indicated; and that, as a result of it, com-

plainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future; is proved by clear and undisputed evidence. Hence, the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act, as amended by the Clayton Act.

Looking first to the former act, the thing declared illegal by its first section . . . is: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The accepted definition of a conspiracy is, a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or to accomplish some purpose not in itself criminal or unlawful by criminal or unlawful means. . . . If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful, it may not be carried out by criminal or unlawful means.

The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a "secondary boycott," that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it. . . .

In Loewe *v.* Lawlor, . . . where there was an effort to compel plaintiffs to unionize their factory by preventing them from manufacturing articles intended for transportation beyond the State, and also by preventing vendees from reselling articles purchased from plaintiffs, and negotiating with plaintiffs for further purchases, by means of a boycott of plaintiffs' products and of dealers who handled them, this court held that there was a conspiracy in restraint of trade, actionable under sec. 7 of the Sher-

man Act, and in that connection said: "The act prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the States, or restricts, in that regard, the liberty of a trader to engage in business. The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes." And when the case came before the court a second time, . . . it was held that the use of the primary and secondary boycott, and the circulation of a list of "unfair dealers," intended to influence customers of plaintiffs, and thus subdue the latter to the demands of the defendants, and having the effect of interfering with plaintiffs' interstate trade, was actionable. . . .

It is settled by these decisions that such a restraint produced by peaceable persuasion is as much within the prohibition as one accomplished by force or threats of force; and it is not to be justified by the fact that the participants in the combination or conspiracy may have some object beneficial to themselves or their associates which possibly they might have been at liberty to pursue in the absence of the statute.

Upon the question whether the provisions of the Clayton Act forbade the grant of an injunction under the circumstances of the present case, the Circuit Court of Appeals was divided; the majority holding that under sec. 20, "perhaps in conjunction with sec. 6," there could be no injunction. . . . Defendants seek to derive from them some authority for their conduct. As to sec. 6, it seems to us its principal importance in this discussion is for what it does *not* authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations, or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself—merely because of

its existence and operation—to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects, and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade, as defined by the anti-trust laws.

The principal reliance is upon sec. 20. . . .

The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before. The second paragraph declares that "no *such* restraining order or injunction" shall prohibit certain conduct specified—manifestly still referring to a "case between an employer and employees, . . . involving, or growing out of, a dispute concerning terms or conditions of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words defining the permitted conduct include particular qualifications consistent with the general one respecting the nature of the case and dispute intended; and the concluding words, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States," are to be read in the light of the context, and mean only that those acts are not to be so held, when committed by parties concerned in "a dispute concerning terms or conditions of employment." If the qualifying words are to have any effect, they must operate to confine the restriction upon the granting of injunctions, and also the relaxation of the provisions of the anti-trust and other laws of the United States, to parties standing in proximate relation to a controversy such as is particularly described.

The majority of the Circuit Court of Appeals appear to have entertained the view that the words "employers and employees," as used in sec. 20, should be treated as referring to "the business class or clan to which the parties litigant respectively belong"; and that, as there had been a dispute at complainant's factory in Michigan concerning the conditions of employment there—a dispute created, it is said, if it did not exist before, by the act of of the Machinists' Union in calling a strike at the factory —sec. 20 operated to permit members of the Machinists' Union elsewhere—some 60,000 in number—although standing in no relation of employment under complainant, past, present, or prospective, to make that dispute their own, and proceed to instigate sympathetic strikes, picketing, and boycotting against employers wholly unconnected with complainant's factory and having relations with complainant only in the way of purchasing its product in the ordinary course of interstate commerce—and this where there was no dispute between such employers and their employees respecting terms or conditions of employment.

We deem this construction altogether inadmissible. Section 20 must be given full effect according to its terms as an expression of the purpose of Congress; but it must be borne in mind that the section imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States, and upon the general operation of the anti-trust laws,—a restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it. Full and fair effect will be given to every word if the exceptional privilege be confined—as the natural meaning of the words confines it—to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment,

past, present, or prospective. The extensive construction adopted by the majority of the court below virtually ignores the effect of the qualifying words. Congress had in mind particular industrial controversies, not a general class war. "Terms or conditions of employment" are the only grounds of dispute recognized as adequate to bring into play the exemptions; and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic, sense by the cause of dispute.

Nor can sec. 20 be regarded as bringing in all members of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members,—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute. That would enlarge by construction the provisions of sec. 20, which contain no mention of labor organizations, so as to produce an inconsistency with sec. 6, which deals specifically with the subject and must be deemed to express the measure and limit of the immunity intended by Congress to be incident to mere membership in such an organization. At the same time it would virtually repeal by implication the prohibition of the Sherman Act, so far as labor organizations are concerned, notwithstanding repeals by implication are not favored; and in effect, as was noted in Loewe *v.* Lawlor, . . . would confer upon voluntary associations of individuals formed within the States a control over commerce among the States that is denied to the governments of the States themselves.

The qualifying effect of the words descriptive of the nature of the dispute and the parties concerned is further borne out by the phrases defining the conduct that is not to be subjected to injunction or treated to a violation of the laws of the United States. . . . The emphasis placed on the words "lawful" and "lawfully," "peaceful" and "peacefully," and the references to the dispute and the

parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the anti-trust laws, or otherwise unlawful. The subject of the boycott is dealt with specifically in the "ceasing to patronize" provision, and by the clear force of the language employed the exemption is limited to pressure exerted upon a "party to such dispute" by means of "peaceful and *lawful*" influence upon neutrals. There is nothing here to justify defendants or the organizations they represent in using either threats or persuasion to bring about strikes or a cessation of work on the part of employees of complainant's customers or prospective customers, or of the trucking company employed by the customers, with the object of compelling such customers to withdraw or refrain from commercial relations with complainant, and of thereby constraining complainant to yield the matter in dispute. To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed "peaceful and lawful" persuasion. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him against his will into a concerted plan to inflict damage upon another employer who is in dispute with his employees. . . .

There should be an injunction against defendants and the associations represented by them, and all members of those associations, restraining them, according to the prayer of the bill, from interfering or attempting to interfere with the sale, transportation, or delivery in interstate commerce of any printing press or presses manufactured by complainant, or the transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, by causing or threatening to cause loss, damage, trouble, or inconvenience to any person, firm, or corporation concerned in the purchase, transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any such contract or contracts; and also and especially from using any force, threats, command, direction, or even persuasion with the object

or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, or engaged in hauling, carting, delivering, installing, handling, using, operating, or repairing any such press or presses for any customer of complainant. Other threatened conduct by defendants or the associations they represent, or the members of such associations, in furtherance of the secondary boycott, should be included in the injunction according to the proofs. . . .

CHAPTER XXX

THE SUPREME COURT AND LABOR LEGISLATION

The decision of the Supreme Court in the Lochner Case excited wide-spread disapproval, coming as it did at a time when there was a nation-wide movement for the betterment of working conditions in mines and factories. Lay opinion generally held that the New York statute was a reasonable measure protecting the health of workers in an exhausting occupation and that the construction placed on the word "liberty" was forced and unnatural. Mayor Gaynor, of New York, once remarked of this decision: "There were no journeymen bakers that I know of clamoring for any such liberty."

Similar exercise of the police power had already encountered many obstacles in the State courts. Labor laws had been repeatedly annulled as in violation of the "due process" clause in State constitutions. On the other hand, in some States such legislation had been upheld as a proper exercise of the police power, and in some instances special clauses authorizing it had been incorporated in the constitution. Even the New York Court of Appeals, whose record had been distinctly conservative, had upheld the constitutionality of the bakery law. The Lochner decision caused great dismay as opening up the possibility of annulment under the Fourteenth Amendment. Apprehensions on this score were not justified by the record of the Supreme Court for a period of almost twenty years. For this reason the dissenting opinions should be carefully studied as they contain the principles followed by the majority of the court in many similar cases arising after 1905.

94. *Lochner* v. *New York* [1]

Mr. Justice Peckham, . . . delivered the opinion of the court.

The indictment, it will be seen, charges that the plaintiff in error violated the one hundred and tenth section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the State of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. . . .

The statute necessarily interferes with the right of contract between the employer and employees, concerning

[1] Supreme Court of the United States, 1905. 198 United States, 45.

the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. . . . Under that provision no State can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere. . . .

The State, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the State, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the Fourteenth Amendment. Contracts in violation of a statute, either of the Federal or State government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of person or of free contract. Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are *sui juris* (both employer and employee), it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose,

or the right of the State to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the State.

This court has recognized the existence and upheld the exercise of the police powers of the States in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of State statutes thus assailed. . . .

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of

the court for that of the legislature. If the act be within the power of the State it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the

general right of an individual to be free in his person and in his power to contract in relation to his own labor. . . .

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go. . . .

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee. . . .

The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. . . .

It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals, or in

any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution. . . .

Mr. Justice Harlan (with whom Mr. Justice White and Mr. Justice Day concurred) dissenting.

While this court has not attempted to mark the precise boundaries of what is called the police power of the State, the existence of the power has been uniformly recognized, both by the Federal and State courts.

All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights. . . .

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety. "The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import," this court has recently said, "an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good." . . .

Granting, then, that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the State may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for the rule is universal that a legislative enactment, Federal or State, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. . . . If there be doubt as

to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its powers extend, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. . . .

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the State to enact such a statute. But the statute before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the State to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. . . .

We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the States. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor.

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is

enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the State and to provide for those dependent upon them.

If such reasons exist, that ought to be the end of this case, for the State is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution of the United States. We are not to presume that the State of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information and for the common good. We cannot say that the State has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal Constitution, for the reason—and such is an all sufficient reason—it is not shown to be plainly and palpably inconsistent with that instrument. Let the State alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a State are primarily for the State to guard and protect.

I take leave to say that the New York statute, in the particulars here involved, cannot be held to be in conflict with the Fourteenth Amendment without enlarging the scope of the amendment far beyond its original purpose, and without bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several

States when exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best. Health laws of every description constitute, said Chief Justice Marshall, a part of that mass of legislation which "embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves." . . . A decision that the New York statute is void under the Fourteenth Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the States to care for the lives, health, and well-being of their citizens. Those are matters which can be best controlled by the States. The preservation of the just powers of the States is quite as vital as the preservation of the powers of the General Government. . . .

Mr. Justice Holmes dissenting.

I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which

takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson *v.* Massachusetts, 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. *v.* United States, 193 U. S. 197. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. Otis *v.* Parker, 187 U. S. 606. The decision sustaining an eight-hour law for miners is still recent. Holden *v.* Hardy, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word liberty, in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce

unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

CHAPTER XXXI

THE SUPREME COURT AND LABOR LEGISLATION

(CONTINUED)

For some years following the Lochner decision the liberal views of the Supreme Court on labor legislation seemed to justify the belief that the principles of that pronouncement—to quote Justice Holmes —"would be allowed a deserved repose." In Muller *v.* Oregon the Supreme Court ruled that an Oregon statute regulating the hours of labor for women was a proper exercise of the police power, women being entitled to special consideration because of their sex. In the Bunting Case the view as to the extent of the police power was even more liberal, the constitutionality of an Oregon law regulating the hours of labor of all persons employed in mills and factories being upheld.

95. *Muller* v. *Oregon* [1]

Mr. Justice Brewer delivered the opinion of the court.

On February 19, 1903, the legislature of the State of Oregon passed an act (Session Laws, 1903, p. 148), the first section of which is in these words:

"Sec. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this State more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day."

Sec. 3 made a violation of the provisions of the prior sections a misdemeanor, subject to a fine of not less than $10 nor more than $25. On September 18, 1905, an information was filed in the Circuit Court of the State for the county of Multnomah, charging that the defendant "on the 4th day of September, A. D. 1905, in the county of Multnomah and State of Oregon, then and there being the owner of a laundry, known as the Grand Laundry,

[1] Supreme Court of the United States, 1908. 208 United States, 412.

in the city of Portland, and the employer of females therein, did then and there unlawfully permit and suffer one Joe Haselbock, he, the said Joe Haselbock, then and there being an overseer, superintendent and agent of said Curt Muller, in the said Grand Laundry, to require a female, to wit, one Mrs. E. Gotcher, to work more than ten hours in said laundry on said 4th day of September, A. D. 1905, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

A trial resulted in a verdict against the defendant, who was sentenced to pay a fine of $10. The Supreme Court of the State affirmed the conviction, State *v.* Muller, 48 Oregon, 252, whereupon the case was brought here on writ of error.

The single question is the constitutionality of the statute under which the defendant was convicted so far as it affects the work of a female in a laundry. That it does not conflict with any provisions of the State constitution is settled by the decision of the Supreme Court of the State. The contentions of the defendant, now plaintiff in error, are thus stated in his brief:

"(1) Because the statute attempts to prevent persons, *sui juris*, from making their own contracts, and thus violates the provisions of the Fourteenth Amendment. . . .

"(2) Because the statute does not apply equally to all persons similarly situated, and is class legislation.

"(3) The statute is not a valid exercise of the police power. The kinds of work prescribed are not unlawful, nor are they declared to be immoral or dangerous to the public health; nor can such a law be sustained on the ground that it is designed to protect women on account of their sex. There is no necessary or reasonable connection between the limitation prescribed by the act and the public health, safety or welfare."

It is the law of Oregon that women, whether married or single, have equal contractual and personal rights with men. . . .

It thus appears that, putting to one side the elective franchise, in the matter of personal and contractual rights

they stand on the same plane as the other sex. Their rights in these respects can no more be infringed than the equal rights of their brothers. We held in Lochner *v.* New York, 198 U. S. 45, that a law providing that no laborer shall be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day was not as to men a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to his labor, and as such was in conflict with, and void under, the Federal Constitution. That decision is invoked by plaintiff in error as decisive of the question before us. But this assumes that the difference between the sexes does not justify a different rule respecting a restriction of the hours of labor.

In patent cases counsel are apt to open the argument with a discussion of the state of the art. It may not be amiss, in the present case, before examining the constitutional question, to notice the course of legislation as well as expressions of opinion from other than judicial sources. In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin. . . .

The legislation and opinions referred to in the margin may not be, technically speaking, authorities, and in them is little or no discussion of the constitutional question presented to us for determination, yet they are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she could be permitted to toil. Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is

affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

It is undoubtedly true, as more than once declared by this court, that the general right to contract in relation to one's business is part of the liberty of the individual, protected by the Fourteenth Amendment to the Federal Constitution; yet it is equally well settled that this liberty is not absolute and extending to all contracts, and that a State may, without conflicting with the provisions of the Fourteenth Amendment, restrict in many respects the individual's power of contract. . . .

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity, continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full asser-

tion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

We have not referred in this discussion to the denial of the elective franchise in the State of Oregon, for while it may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason

runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.

For these reasons, and without questioning in any respect the decision in Lochner *v.* New York, we are of the opinion that it cannot be adjudged that the act in question is in conflict with the Federal Constitution, so far as it respects the work of a female in a laundry, and the judgment of the Supreme Court of Oregon is *Affirmed.*

96. *Bunting* v. *Oregon* [1]

Mr. Justice McKenna delivered the opinion of the court.

Indictment charging a violation of a statute of the State of Oregon, sec. 2 of which provides as follows:

"No person shall be employed in any mill, factory or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; *provided, however,* employees may work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one-half of the regular wage."

A violation of the act is made a misdemeanor, and in pursuance of this provision the indictment was found. It charges a violation of the act by plaintiff in error, Bunting, by employing and causing to work in a flour mill belonging to the Lakeview Flouring Mills, a corporation, one Hammersly for thirteen hours in one day, Hammersly not being within the excepted conditions, and not being paid the rate prescribed for overtime.

A demurrer was filed to the indictment, alleging against its sufficiency that the law upon which it was based is invalid because it violates the Fourteenth Amendment of the Constitution of the United States and the Constitution of Oregon.

The demurrer was overruled; and the defendant, after

[1] Supreme Court of the United States, 1920. 243 United States, 426.

arraignment, plea of not guilty and trial, was found guilty. A motion in arrest of judgment was denied and he was fined $50. The judgment was affirmed by the Supreme Court of the State. The Chief Justice of the court then allowed this writ of error.

The consonance of the Oregon law with the Fourteenth Amendment is the question in the case, and this depends upon whether it is a proper exercise of the police power of the State, as the Supreme Court of the State decided that it is.

That the police power extends to health regulations is not denied, but it is denied that the law has such purpose or justification. It is contended that it is a wage law, not a health regulation, and takes the property of plaintiff in error without due process. The contention presents two questions: (1) Is the law a wage law, or an hours of service law? And (2) if the latter, has it equality of operation?

Section 1 of the law expresses the policy that impelled its enactment to be the interest of the State in the physical well-being of its citizens and that it is injurious to their health for them to work "in any mill, factory or manufacturing establishment" more than ten hours in any one day; and sec. 2 as we have seen, forbids their employment in those places for a longer time. If, therefore, we take the law at its word there can be no doubt of its purpose, and the Supreme Court of the State has added the confirmation of its decision, by declaring that "the aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties."

It is, however, urged that we are not bound by the declaration of the law or the decision of the court. In other words, and to use counsel's language, "the legislative declaration of necessity, even if the act followed such declaration, is not binding upon this court. Coppage *v.* Kansas, 236 U. S. 1." Of course, mere declaration cannot give character to a law nor turn illegal into

legal operation, and when such attempt is palpable this court necessarily has the power of review.

But does either the declaration or the decision reach such extremes? Plaintiff in error, in contending for this and to establish it, makes paramount the provision for overtime; in other words, makes a limitation of the act the extent of the act—indeed, asserts that it gives, besides, character to the act, illegal character.

To assent to this is to ascribe to the legislation such improvidence of expression as to intend one thing and effect another, or artfulness of expression to disguise illegal purpose. We are reluctant to do either and we think all the provisions of the law can be accommodated without doing either.

First, as to plaintiff in error's attack upon the law. He says: "The law is not a ten-hour law; it is a thirteen-hour law designed solely for the purpose of compelling the employer of labor in mills, factories and manufacturing establishments to pay more for labor than the actual market value thereof." And further: "It is a ten-hour law for the purpose of taking the employer's property from him and giving it to the employee; it is a thirteen-hour law for the purpose of protecting the health of the employee." To this plaintiff in error adds that he was convicted, not for working an employee during a busy season for more than ten hours, but for not paying him more than the market value of his services.

The elements in this contention it is difficult to resolve or estimate. The charge of pretense against the legislation we, as we have already said, cannot assent to. The assumption that plaintiff in error was convicted for not paying more in a busy season than the market value of the services rendered him or that under the law he will have to do so, he gives us no evidence to support. If there was or should be an increase of demand for his products, there might have been or may be an increase of profits. However, these are circumstances that cannot be measured, and we prefer to consider with more exactness the overtime provision.

There is a certain verbal plausibility in the contention

that it was intended to permit 13 hours' work if there be 15½ hours' pay, but the plausibility disappears upon reflection. The provision for overtime is permissive in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission. Besides, it is to be borne in mind that the legislature was dealing with a matter in which many elements were to be considered. It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided occasions not of such imperative necessity, and yet which should have some accommodation—abuses prevented by the requirement of higher wages. Or even a broader contention might be made that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purpose through the interest of those affected rather than by the positive fiat of the law.

We cannot know all of the conditions that impelled the law or its particular form. The Supreme Court, nearer to them, describes the law as follows: "It is clear that the intent of the law is to make 10 hours a regular day's labor in the occupations to which reference is made. Apparently the provisions for permitting labor for the overtime on express conditions were made in order to facilitate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause."

But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the

precise reasons for its exercise or be convinced of the wisdom of its exercise. Rast *v.* Van Deman & Lewis Co., 240 U. S. 342, 365. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal.

But passing general considerations and coming back to our immediate concern, which is the validity of the particular exertion of power in the Oregon law, our judgment of it is that it does not transcend constitutional limits.

This case is submitted by plaintiff in error upon the contention that the law is a wage law not an hours of service law, and he rests his case on that contention. To that contention we address our decision and do not discuss or consider the broader contentions of counsel for the State that would justify the law even as a regulation of wages.

There is a contention made that the law, even regarded as regulating hours of service, is not either necessary or useful "for preservation of the health of employees in mills, factories and manufacturing establishments." The record contains no facts to support the contention, and against it is the judgment of the legislature and the Supreme Court, which said: "In view of the well-known fact that the custom in our industries does not sanction a longer service than 10 hours per day, it cannot be held,

as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain 9; in the United States, $9\frac{3}{4}$; in Denmark, $9\frac{3}{4}$; in Norway, 10; Sweden, France, and Switzerland, $10\frac{1}{2}$; Germany, $10\frac{1}{4}$; Belgium, Italy, and Austria, 11; and in Russia, 12 hours."

The next contention of plaintiff in error is that the law discriminates against mills, factories and manufacturing establishments in that it requires that a manufacturer, without reason other than the fiat of the legislature, shall pay for a commodity, meaning labor, one and one-half times the market value thereof while other people purchasing labor in like manner in the open market are not subjected to the same burden. But the basis of the contention is that which we have already disposed of, that is, that the law regulates wages, not hours of service. Regarding it as the latter, there is a basis for the classification.

Further discussion we deem unnecessary.

Judgment affirmed.

CHAPTER XXXII

THE SUPREME COURT AND LABOR LEGISLATION

(CONTINUED)

On April 9, 1923, the Supreme Court in Adkins *et al. v.* Children's Hospital handed down a decision at which latent hostility toward that tribunal as a barrier in the way of social legislation, quiescent for more than a decade, suddenly flared up afresh. In this decision an act of Congress authorizing the establishment of a minimum wage rate for women employed in the District of Columbia was declared unconstitutional as a violation of the Fifth Amendment. The implications were sweeping. If the statute in question were violative of the Fifth Amendment, similar acts in a dozen or more States would violate the "due process" clause of the Fourteenth. Did it mean the inauguration of an era when the narrow constructions of the Lochner Case would be applied to social and economic legislation? It is alleged by some that the opinions of the Supreme Court on matters like the police power and private rights merely reflect the current philosophy on these questions. To such persons the distinctions made between the status of women in the Muller Case of 1908, and the Adkins Case of 1923, will seem to be supported by several tendencies apparent since the World War. Among the latter are the decisive rejection of the Child Labor Amendment, the growing impatience of the general public toward the activities of organized labor, hostility toward governmental meddling in private business, growing opposition toward further Federal centralization, a friendlier attitude toward railroad and public utility corporations, the demand for curtailment of government expenditures. Yet it must not be forgotten that the Supreme Court during this period upheld the constitutionality of the New York rent laws and the "recapture clause" of the Transportation Act of 1920, both involving a drastic restriction on what are ordinarily considered the rights of private property.

97. *Adkins* et al. v. *Children's Hospital*[1]

[A congressional enactment of September 19, 1918, provided for the fixing of minimum wages for women and children in the District of Columbia. The act authorized the creation of a board of three members, empowered to

[1] Supreme Court of the United States, 1923. Adkins *et al.*, Minimum Wage Board of District of Columbia *v.* Children's Hospital of the District of Columbia. Same *v.* Lyons. 261 United States, 525.

investigate wages of women and minors, to declare minimum wage standards for such persons, and after proper investigation and conference of interested parties and the public on specific occupations, to order what it considered a proper minimum wage for that occupation, and to require employers to comply therewith. The board's decisions on questions of fact were to be final, an appeal being permitted on questions of law. The purpose of the enactment was declared to be the protection of women and minors "from conditions detrimental to their health and morals, resulting from wages which are inadequate to maintain decent standards of living; and the act in each of its provisions and in its entirety shall be interpreted to effectuate these purposes."

The appellee in the first of these cases was a hospital corporation employing a large number of women, and in the second a woman employee of a hotel who was discharged from her position as elevator operator because her employer could not afford to comply with an order of the board in regard to wages. In both cases an attempt was made to enjoin the board on constitutional grounds, from enforcing its order. The Supreme Court of the District denied an injunction, but the Court of Appeals reversed this decision and the cases were brought on appeal to the Supreme Court of the United States.]

Mr. Justice Sutherland delivered the opinion of the court. . . .

The statute now under consideration is attacked upon the ground that it authorizes an unconstitutional interference with the freedom of contract included within the guaranties of the due process clause of the Fifth Amendment. That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause is settled by the decisions of this court and is no longer open to question. . . .

Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining. . . .

There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception, and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances. Whether these circumstances exist in the present case constitutes the question to be answered. It will be helpful to this end to review some of the decisions where the interference has been upheld and consider the grounds upon which they rest.

(1) *Those dealing with statutes fixing rates and charges to be exacted by businesses impressed with a public interest.* . . . In the case at bar the statute does not depend upon the existence of a public interest in any business to be affected, and this class of cases may be laid aside as inapplicable.

(2) *Statutes relating to contracts for the performance of public work.* . . . These cases sustain such statutes as depending, not upon the right to condition private contracts, but upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it, or, in the case of a state, for its municipalities. We may therefore, in like manner, dismiss these decisions from consideration as inapplicable.

(3) *Statutes prescribing the character, methods, and time for payment of wages.* . . . Their tendency and purpose was to prevent unfair, and perhaps fraudulent, methods in the payment of wages, and in no sense can they be said to be, or to furnish a precedent for, wage-fixing statutes.

(4) *Statutes fixing hours of labor.* It is upon this class that the greatest emphasis is laid in argument and, therefore, and because such cases approach most nearly the line of principle applicable to the statute here involved, we shall consider them more at length.

[The court proceeds to consider several decisions including that in the Lochner Case, stating in regard to the latter: "Subsequent cases in this court have been distinguished from that decision, but the principles therein stated have never been disapproved."]

If now, in the light furnished by the foregoing exceptions to the general rule forbidding legislative interference with freedom of contract, we examine and analyze the statute in question, we shall see that it differs from them in every material respect. It is not a law dealing with any business charged with a public interest or with public work, or to meet and tide over a temporary emergency. It has nothing to do with the character, methods or periods of wage payments. It does not prescribe hours of labor or conditions under which labor is to be done. It is not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women (for we are not now considering the provisions relating to minors), who are legally as capable of contracting for themselves as men. It forbids two parties having lawful capacity—under penalties as to the employer—to freely contract with one another in respect of the price for which one shall render service to the other in a purely private employment where both are willing, perhaps anxious, to agree, even though the consequence may be to oblige one to surrender a desirable engagement and the other to dispense with the services of a desirable employee. The price fixed by the board need have no relation to the capacity or earning power of the employee, the number of hours which may happen to constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of the employment, and, while it has no other basis to support its validity than the assumed necessities of the employee, it takes no account of any independent resources she may have. It is based wholly on the opinions of the members of the board and their advisers—perhaps an average of their opinions, if they do not precisely agree—as to what will be necessary to provide a living for a woman, keep her in health and preserve her morals. It applies to any and every occupation in the District, without regard to its nature or the character of the work.

The standard furnished by the statute for the guidance of the board is so vague as to be impossible of practical

application with any reasonable degree of accuracy. What is sufficient to supply the necessary cost of living for a woman worker and maintain her in good health and protect her morals is obviously not a precise or unvarying sum—not even approximately so. The amount will depend upon a variety of circumstances: The individual temperament, habits of thrift, care, ability to buy necessaries intelligently, and whether the woman live alone or with her family. To those who practice economy, a given sum will afford comfort, while to those of contrary habit the same sum will be wholly inadequate. The co-operative economies of the family group are not taken into account, though they constitute an important consideration in estimating the cost of living, for it is obvious that the individual expense will be less in the case of a member of a family than in the case of one living alone. The relation between earnings and morals is not capable of standardization. It cannot be shown that well-paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages, and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis. No distinction can be made between women who work for others and those who do not; nor is there ground for distinction between women and men, for, certainly, if women require a minimum wage to preserve their morals men require it to preserve their honesty. For these reasons, and others which might be stated, the inquiry in respect of the necessary cost of living and of the income necessary to preserve health and morals presents an individual and not a composite question, and must be answered for each individual considered by herself and not by a general formula prescribed by a statutory bureau.

This uncertainty of the statutory standard is demonstrated by a consideration of certain orders of the board already made. These orders fix the sum to be paid to a woman employed in a place where food is served or in a

mercantile establishment, at $16.50 per week; in a printing establishment, at $15.50 per week; and in a laundry, at $15 per week, with a provision reducing this to $9 in the case of a beginner. If a woman employed to serve food requires a minimum of $16.50 per week, it is hard to understand how the same woman working in a printing establishment or in a laundry is to get on with an income lessened by from $1 to $7.50 per week. The board probably found it impossible to follow the indefinite standard of the statute, and brought other and different factors into the problem; and this goes far in the direction of demonstrating the fatal uncertainty of the act, an infirmity which, in our opinion, plainly exists.

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum, not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses, which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds

the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

The feature of this statute, which perhaps more than any other, puts upon it the stamp of invalidity, is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, viz. that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or grocer to buy food, he is morally entitled to obtain the worth of his money; but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more, simply because he needs more; and the

shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it, and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States. . . .

Finally, it may be said that if, in the interest of the public welfare, the police power may be invoked to justify the fixing of a minimum wage, it may, when the public welfare is thought to require it, be invoked to justify a maximum wage. The power to fix high wages connotes, by like course of reasoning, the power to fix low wages. If, in the face of the guaranties of the Fifth Amendment, this form of legislation shall be legally justified, the field for the operation of the police power will have been widened to a great and dangerous degree. If, for example, in the opinion of future lawmakers, wages in the building trades shall become so high as to preclude people of ordinary means from building and owning homes, an authority which sustains the minimum wage will be invoked to support a maximum wage for building laborers and artisans, and the same argument which has been here urged to strip the employer of his constitutional liberty of con-

tract in one direction will be utilized to strip the employee of his constitutional liberty of contract in the opposite direction. A wrong decision does not end with itself; it is a precedent, and, with the swing of sentiment, its bad influence may run from one extremity of the arc to the other.

It has been said that legislation of the kind now under review is required in the interest of social justice, for whose ends freedom of contract may lawfully be subjected to restraint. The liberty of the individual to do as he pleases, even in innocent matters, is not absolute. It must frequently yield to the common good, and the line beyond which the power of interference may not be pressed is neither definite nor unalterable, but may be made to move, within limits not well defined, with changing need and circumstance. Any attempt to fix a rigid boundary would be unwise as well as futile. But, nevertheless, there are limits to the power, and, when these have been passed, it becomes the plain duty of the courts in the proper exercise of their authority to so declare. To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members.

It follows, from what has been said, that the act in question passes the limit prescribed by the Constitution, and accordingly the decrees of the court below are

Affirmed.

[Mr. Justice Brandeis did not take part in the consideration of this case. The dissenting opinion of Mr. Chief Justice Taft, in which Mr. Justice Sanford concurred, is here omitted.]

Mr. Justice Holmes, dissenting.

The question in this case is the broad one. Whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress had no power to meddle with the matter at all. To me, not-

withstanding the deference due to the prevailing judgment of the Court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price, it seems to me impossible to deny that the belief reasonably may be held by reasonable men. If the law encountered no other objection than that the means bore no relation to the end or that they cost too much I do not suppose that anyone would venture to say that it was bad. I agree, of course, that a law answering the foregoing requirements might be invalidated by specific provisions of the Constitution. For instance it might take private property without just compensation. But in the present instance the only objection that can be urged is found within the vague contours of the Fifth Amendment, prohibiting the depriving any person of liberty or property without due process of law. To that I turn.

The earlier decisions upon the same words in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts. Without enumerating all the restrictive laws that have been upheld I will mention a few that seem to me to have interfered with liberty of contract quite as seriously and directly as the one before us. Usury laws prohibit contracts by which a man receives more than so much interest for the money that

he lends. Statutes of frauds restrict many contracts to certain forms. Some Sunday laws prohibit practically all contracts during one-seventh of our whole life. . . .

I confess that I do not understand the principle on which the power to fix a minimum for the wages of women can be denied by those who admit the power to fix a maximum for their hours of work. I fully assent to the proposition that here as elsewhere the distinctions of the law are distinctions of degree, but I perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate. Muller *v.* Oregon, I take it, is as good law to-day as it was in 1908. It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women, or that legislation cannot take those differences into account. I should not hesitate to take them into account if I thought it necessary to sustain this Act. Quong Wing *v.* Kirkendall, 223 U. S. 59, 63. But after Bunting *v.* Oregon, 243 U. S. 426, I had supposed that it was not necessary, and that Lochner *v.* New York, 198 U. S. 45, would be allowed a deserved repose.

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld. I see no greater objection to using a Board to apply the standard fixed by the act than there is to the other commissions with which we have become familiar or than there is to the requirement of a license in other cases. The fact that the statute warrants classification, which like all classifications may bear hard upon some individuals, or in exceptional cases, notwithstanding the power given to the Board to issue a special license, is no greater infirmity than is incident to all law. But the

ground on which the law is held to fail is fundamental and therefore it is unnecessary to consider matters of detail.

The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly cannot be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria and a number of the States of this Union. The belief is fortified by a very remarkable collection of documents submitted on behalf of the appellants, material here, I conceive, only as showing that the belief reasonably may be held. In Australia the power to fix a minimum for wages in the case of industrial disputes extending beyond the limits of any one State was given to a Court, and its President wrote a most interesting account of its operation. 29 *Harv. Law Rev.* 13. If a legislature should adopt what he thinks the doctrine of modern economists of all schools, that "freedom of contract is a misnomer as applied to a contract between an employer and an ordinary individual employee," *Ibid.* 25, I could not pronounce an opinion with which I agree impossible to be entertained by reasonable men. If the same legislature should accept his further opinion that industrial peace was best attained by the device of a Court having the above powers, I should not feel myself able to contradict it, or to deny that the end justified restrictive legislation quite as adequately as beliefs concerning Sunday or exploded theories about usury. I should have my doubts, as I have them about this statute —but they would be whether the bill that has to be paid for every gain, although hidden as interstitial detriments, was not greater than the gain was worth: a matter that it is not for me to decide.

I am of opinion that the statute is valid and that the decree should be reversed.

CHAPTER XXXIII

LIMITATIONS UPON STATE POWERS

Under their police power, subject to the restrictions imposed by the Federal Constitution, the States may exercise broad governmental authority and conduct activities involving a wide range of social, economic, and political experiment. It must be remembered, however, that the prevailing political philosophy of this country has been one of distrust, which has found expression in the general belief that the separation of powers and the written constitution itself are absolute prerequisites of free government. Consequently, in their State constitutions the people placed beyond their own reach, except through the amending process, certain powers whose exercise might be dangerous to personal or property rights. The idea that the people may choose a government with sovereign authority, charging that government with the execution of the public will, and accepting the consequences—good or bad—of their own decision, has made no headway in this country.

The demand for humanitarian and regulatory legislation, due to the great industrial changes of the nineteenth century, collided with traditional constitutional and legal principles. As may be seen in the following decisions the courts were obliged to pass on the question whether the legislatures, under existing limitations, were competent to pass enactments restricting the liberty of contract, or infringing on property rights. The results were unfortunate in some respects. The courts were frequently charged with subservience to corporate interests and the power of wealth. Clauses dealing with the regulation of employment in mines and factories, the protection of women and children in industry, the control of public utilities and similar matters ordinarily considered statutory in character, were incorporated in State constitutions in order to insure their constitutional status and prevent possible judicial annulment. Proposals for the recall of judges, or the annulment of decisions on questions of constitutionality by popular vote, were seriously discussed. Worst of all, the need of a long term, appointive and powerful judiciary in the administration of civil, and especially, criminal justice, has been neglected because of the popular belief that such a judiciary would have unlimited opportunity to frustrate popular will as expressed in legislative enactments. It is only fair to state that the courts have taken a much more liberal view of the police power in recent years, abandoning many of the narrowly technical interpretations of twenty years ago.

98. *The Limits of State Governmental Power*[1]

Aside from the limitations imposed upon state governments by virtue of their membership in the national union, all limitations upon state governmental powers are to be found in the written state constitutions. . . .

In the construction of state constitutions, it has been assumed that the executive and judicial departments have only such powers as are conferred by the constitution itself, or by legislative acts not in conflict with the constitution. The legislative department, on the other hand, is assumed to possess all the powers of the state not forbidden to it, directly or indirectly, by the state constitution. . . .

Almost all of the express limitations to be found in state constitutions are limitations upon state legislative power. This has been the natural development, for the state legislative department is the organ for the development of governmental policies. The judicial department to some extent, and the executive department to perhaps a greater extent, may develop something of governmental policy; but these departments are limited in their activities to the powers granted them by the constitution or by legislation. If the state government is to be limited, it is natural that the limitations should be directed primarily against that organ of government which has capacity to act. For this reason the study of state government and of its development in this country is largely a study of the development of limitations upon state legislative powers. The steady limitation of legislative powers has been the one dominant feature of state constitutional development. The express limitations upon state legislative power are numerous and have steadily increased. These limitations have to do largely with the incurring of debt, the making of appropriations, local and special legislation, and matters of legislative procedure. . . .

[1] Walter F. Dodd, *State Government*, 131–2. Reprinted by permission of The Century Company, New York City.

99. In re *Morgan*[1]

The prosecution was under section 2 of "An act regulating the hours of employment in underground mines, and in smelting and ore reduction works, and providing penalties for violations thereof," passed by the twelfth general assembly, the material provisions of which are embraced in the first two sections:

"Sec. 1. The period of employment of working men in all underground mines or workings shall be eight (8) hours per day, except in case of emergency, where life or property is in imminent danger.

"Sec. 2. The period of employment of working men in smelters, and in all other institutions for the reduction or refining of ores or metals, shall be eight (8) hours per day, except in cases of emergency, where life or property is in imminent danger." . . .

Chief Justice Campbell delivered the opinion of the court. . . .

The business of operating smelters and working underground mines is purely a private business. It is not affected with a public interest, or devoted to a public use. Even here the general and better rule is that regulation of such businesses are confined to their public side, and do not descend to interference in contracts and strictly private dealing between employers and employees. Hence, smelting does not come within the operation of the principle of those decisions in which have been upheld reasonable regulations of a business affected by a public interest. If, to protect the health of workmen engaged in these two occupations, the legislature may limit them to eight hours' labor per day, it may hereafter, upon the ground that idleness, resulting from short hours of labor, leads to drunkenness and gambling; and industry, promoted by longer hours, to happiness and health, enact that workmen must labor at these occupations fourteen or sixteen hours per day; and by extending the same principle to other occupations, it may say, to use an illustration employed in argument, that a man

[1] Supreme Court of Colorado, 1899. 26 Colorado, 415.

weighing one hundred and twenty pounds or less shall not work in a stone quarry, because only large and powerful men can safely work therein; that only men free from a tendency to tuberculosis shall work at indoor occupations, because those so afflicted need more pure air and sunshine than they can get if excluded from the open air; that only persons not needing the aid of eye-glasses shall become makers or repairers of watches, because labor, with such mechanical aids, upon delicate mechanisms tends to destroy vision; or that those suffering from sluggish livers shall not engage in sedentary occupations, because their health demands active, muscular effort. . . .

If counsel's contention be sound, that to promote the general welfare and protect the public health or safety, the legislature is above the constitution and brooks no restraint; if it is the sole judge, not merely of the exigency, but also of the subjects for the exercise of the police power and its reasonableness, then, indeed, all these, and almost all other conceivable regulations of private affairs are permissible. . . .

In this connection we notice, what has already been suggested, an argument pressed upon us in support of this species of legislation. We are told that the law is, to a large extent, a progressive science; that during our national existence many changes and reforms both in procedure and in substantive law, have been made; and that to conform to the complex conditions of modern society and to solve the many problems arising out of the industrial relations, many more such will likely take place, and the law will be forced to adapt itself to these new conditions, if society is to be kept together and government preserved.

We are not disposed to dispute the accuracy of these observations or the correctness of the prediction made, but we fail to perceive the force of the application to the statute in hand. Such legislation does not denote an advance in the law of the domestic relations. On the contrary, it is a distinct and emphatic return, a retrogression, to that period in English history when parliament busied itself in passing numerous acts interfering with

the freedom of conscience in religious matters, and in prescribing minute regulations of the personal conduct of the individual, against which our ancestors rebelled, and which was one, among other causes, that prompted them to found here a government under which it would be impossible thus to interfere with the purely private affairs of the citizen. . . .

The result of our deliberation, therefore, is that this is an unwarrantable interference with, and infringes, the right of both the employer and employee in making contracts relating to a purely private business, in which no possible injury to the public can result; that it unjustly and arbitrarily singles out a class of persons and imposes upon them restrictions from which others similarly situated and substantially in the same condition, are exempt; and that it is not, under our constitution, a valid exercise of the police power of this state either in the subject selected or in the reasonableness of the regulation. . . .

100. *Amendment to Colorado Constitution*[1]

The General Assembly shall provide by law and shall prescribe suitable penalties for the violation thereof, for a period of employment not to exceed eight (8) hours within any twenty-four (24) hours (except in cases of emergency where life or property is in imminent danger), for persons employed in underground mines or other underground workings, blast furnaces, smelters; or any ore reduction works or other branch of industry or labor that the General Assembly may consider injurious or dangerous to health, life or limb.

101. *People* v. *Williams*[2]

The provision of the Labor Law now in question is contained in section 77; which is entitled: "Hours of labor of minors and women" and reads that "No minor under the age of eighteen years, and no female shall be employed, permitted or suffered to work in any factory in this state before six o'clock in the morning, or after

[1] Article V, Section 25a. Adopted November 4, 1902.
[2] Court of Appeals of New York, 1907. 189 New York, 131.

nine o'clock in the evening of any day; or for more than ten hours in any one day except to make a shorter work day on the last day of the week; or for more than sixty hours in any one week, or more hours in any one week than will make an average of ten hours per day for the whole number of days so worked." . . .

Gray, J. I think that the legislature, in preventing the employment of an adult woman in a factory, and in prohibiting her to work therein, before six o'clock in the morning, or after nine o'clock in the evening, has overstepped the limits set by the Constitution of the state to the exercise of the power to interfere with the rights of citizens. The fundamental law of the state, as embodied in its Constitution, provides that "no person shall . . . be deprived of life, liberty or property without due process of law." (Art. 1, sec. 6). The provisions of the State and of the Federal Constitutions protect every citizen in the right to pursue any lawful employment in a lawful manner. He enjoys the utmost freedom to follow his chosen pursuit and any arbitrary distinction against, or deprivation of, that freedom by the legislature is an invasion of the constitutional guaranty. Under our laws men and women now stand alike in their constitutional rights and there is no warrant for making any discrimination between them with respect to the liberty of person, or of contract. It is claimed, however, in this case, that the enactment in question can be justified as an exercise of the police power of the state; having for its purpose the general welfare of the state in a measure for the preservation of the health of the female citizens. It is to be observed that it is not a regulation of the number of hours of labor for working women; the enactment goes far beyond this. It attempts to take away the right of a woman to labor before six o'clock in the morning, or after nine o'clock in the evening, without any reference to other considerations. In providing that "no female shall be employed, permitted, or suffered to work in any factory in this state before six o'clock in the morning, or after nine o'clock in the evening of any day," she is prevented, however willing, from engaging herself in a lawful em-

ployment during the specified periods of the twenty-four hours. Except as to women under twenty-one years of age, this was the first attempt on the part of the state to restrict their liberty of person, or their freedom of contract, in the pursuit of a vocation. I find nothing in the language of the section which suggests the purpose of promoting health, except as it might be inferred that for a woman to work during the forbidden hours of night would be unhealthful. If the inhibition of the section in question had been framed to prevent the ten hours of work from being performed at night, or to prolong them beyond nine o'clock in the evening, it might, more readily, be appreciated that the health of women was the matter of legislative concern. That is not the effect, nor the sense, of the provision of the section with which, alone, we are dealing. It was not the case upon which this defendant was convicted. If this enactment is to be sustained, then an adult woman, although a citizen and entitled as such to all the rights of citizenship under our laws, may not be employed, nor contract to work, in any factory for any period of time, no matter how short, if it is within the prohibited hours; and this, too, without any regard to the healthfulness of the employment. It is clear, as it seems to me, that this legislation cannot, and should not, be upheld as a proper exercise of the police power. It is, certainly, discriminative against female citizens, in denying to them equal rights with men in the same pursuit. The courts have gone very far in upholding legislative enactments, framed clearly for the welfare, comfort and health of the community, and that a wide range in the exercise of the police power of the state should be conceded, I do not deny; but, when it is sought under the guise of a labor law, arbitrarily, as here, to prevent an adult female citizen from working at any time of the day that suits her, I think it is time to call a halt. It arbitrarily deprives citizens of their right to contract with each other. The tendency of legislatures, in the form of regulatory measures, to interfere with the lawful pursuits of citizens is becoming a marked one in this country, and it behooves the courts, firmly and fear-

lessly, to interpose the barriers of their judgments, when invoked to protect against legislative acts, plainly, transcending the powers conferred by the Constitution upon the legislative body. . . .

102. *People* v. *Schweinler Press*[1]

The statute for violation of which the appellant was convicted reads as follows:

"Sec. 93-b. Period of rest at night for women. In order to protect the health and morals of females employed in factories by providing an adequate period of rest at night, no woman shall be employed or permitted to work in any factory in this state before six o'clock in the morning or after ten o'clock in the evening of any day." . . .

Hiscock, J. At the time when this statute was adopted there was before the legislature the report of a commission created by it to consider and report on this subject, [showing that night work was so injurious to women] that it ought to be prohibited both for their own sakes and for the sake of the offspring whom they might bear. . . .

There can be no doubt that the means adopted tended to prevent the apprehended danger. The only chance for debate would be whether the prohibition is so wide and so universal that it can be said that it is so out of proportion to the benefits sought that it is burdensome and unreasonable to a degree which transcends the discretion of the legislature. We feel sure this cannot be said. What is reasonable and appropriate in such a matter must be largely decided by prevailing opinion and judgment, and by reference to what has been and is being done with approval by this and other states and countries in the same and similar matters, and, as has been pointed out, there is no lack of support in such respects for the present enactment. If it is proper, as it certainly has been held to be both by widely held public opinion and by the decisions of the Supreme Court of the land, to protect the health of woman by restricting the hours during which she may labor in certain pursuits, it cannot be said as a

[1] Court of Appeals of New York, 1915. 214 New York, 395.

matter of constitutional law that it is illogical and improper for the legislature to take the further step, which it now has taken, and say that those hours of labor must not be performed at times and under conditions which as a matter of general experience tend generally and substantially to break down the health of the laborer. It requires no very great exercise of judgment and discretion to justify this additional forward step in protective regulation, and it seems to us to be within the power possessed by the legislature. Of course we are well aware that the process of justifying a new step by the fact that it marks but a short advance over the last preceding one if continued long enough may lead to extremes which cannot be approved. But while we may appreciate that possibility, we only have before us now the specific advance taken by this particular statute, and as we have indicated we think that it is not only not condemned by the test of all the facts and principles of law which are applicable, but is supported and sustained by them. . . .

Therefore, we conclude the statute is constitutional as a police regulation in the interest of public health and the general welfare of the people of the state. . . .

Lastly, it is urged that whatever might be our original views concerning this statute, our decision in People *v.* Williams, (189 N. Y. 131) is an adjudication which ought to bind us to the conclusion that it is unconstitutional. While it may be that this argument is not without an apparent and superficial foundation and ought to be fairly met, I think that a full consideration of the Williams case and of the present one will show that they may be really and substantially differentiated and that we should not be and are not committed by what was said and decided in the former to the view that the legislature had no power to adopt the present statute. . . .

That statute bore on its face no clear evidence that it was passed for the purpose of protecting the health and welfare of women working in factories, and while of course the presence or absence of such a label would not be controlling in determining the purposes and validity of the statute, it still was in that case an incident of some im-

portance as leading to the conclusions finally expressed by Judge Gray and adopted by the court as appears by the quotations from his opinion hereafter made.

While theoretically we may have been able to take judicial notice of some of the facts and of some of the legislation now called to our attention as sustaining the belief and opinion that night work in factories is widely and substantially injurious to the health of women, actually very few of these facts were called to our attention, and the argument to uphold the law on that ground was brief and inconsequential.

Especially and necessarily was there lacking evidence of the extent to which during the intervening years the opinion and belief have spread and strengthened that such night work is injurious to women; of the laws, as indicating such belief, since adopted by several of our own states and by large European countries, and the report made to the legislature by its own agency, the factory investigating commission, based on investigation of actual conditions and study of scientific and medical opinion that night work by women in factories is generally injurious and ought to be prohibited . . .

So, as it seems to me, in view of the incomplete manner in which the important question underlying this statute —the danger to women of night work in factories—was presented to us in the Williams case, we ought not to regard its decision as any bar to a consideration of the present statute in the light of all the facts and arguments now presented to us and many of which are in addition to those formerly presented, not only as a matter of mere presentation, but because they have been developed by study and investigation during the years which have intervened since the Williams decision was made. There is no reason why we should be reluctant to give effect to new and additional knowledge upon such a subject as this even if it did lead us to take a different view of such a vastly important question as that of public health or disease than formerly prevailed. Particularly do I feel that we should give serious consideration and great weight to the fact that the present legislation is based upon and

sustained by an investigation by the legislature deliberately and carefully made through an agency of its own creation, the present factory investigating commission. . . .

CHAPTER XXXIV

LIMITATIONS UPON STATE LEGISLATURES

"These modern constitutions," declared Elihu Root discussing the tendencies of State government while the pending Seventeenth Amendment was under debate in the United States Senate, "which are filled with specific provisions, limiting and directing the legislature in every direction, furnishing such startling contrasts to the simplicity of the Constitution of the United States, are an expression of distrust in representative government." Opinions are many and varied as to the causes of this distrust but the fact of its existence is indisputable. The constitutional forms in which it finds typical expression, and the consequent difficulties of the courts in deciding legislative competence under such restrictions, are illustrated in the following selections:

103. *The Virginia Constitution*[1]

Sec. 46. The General Assembly shall meet once in two years on the second Wednesday in January next succeeding the election of the members of the House of Delegates and not oftener unless convened in the manner prescribed by this Constitution. No session of the General Assembly, after the first under this Constitution, shall continue longer than sixty days; but with the concurrence of three-fifths of the members elected to each house, the session may be extended for a period not exceeding thirty days. Except for the first session held under this Constitution, members shall be allowed a salary for not exceeding sixty days at any regular session, and for not exceeding thirty days at any extra session. Neither house shall, without the consent of the other, adjourn to another place nor for more than three days. A majority of the members elected to each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and shall have power to compel the attendance of members in such manner and under such penalty as each house may prescribe.

[1] Article IV, Sections 46–64 *passim*. Adopted, July 10, 1902.

Sec. 49. Each house shall keep a journal of its proceedings, which shall be published from time to time, and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Sec. 50. No law shall be enacted except by bill. A bill may originate in either house, to be approved or rejected by the other, or may be amended by either, with the concurrence of the other.

No bill shall become a law unless, prior to its passage, it has been,

(*a*) Referred to a committee of each house, considered by such committee in session, and reported;

(*b*) Printed by the house, in which it originated, prior to its passage therein;

(*c*) Read at length on three different calendar days in each house; and unless,

(*d*) A yea and nay vote has been taken in each house upon its final passage, the names of the members voting for and against entered on the journal, and a majority of those voting, which shall include at least two-fifths of the members elected to each house, recorded in the affirmative.

And only in the manner required in subdivision (d) of this section shall an amendment to a bill by one house be concurred in by the other, or a conference report be adopted by either house, or either house discharge a committee from the consideration of a bill and consider the same as if reported; provided, that the printing and reading, or either, required in subdivisions (b) and (c) of this section may be dispensed with in a bill to codify the laws of the State, and in any case of emergency by a vote of four-fifths of the members voting in each house taken by the yeas and nays, the names of the members voting for and against, entered on the journal; and provided further, that no bill which creates, or establishes a new office, or which creates, continues, or revives a debt or charge, or makes, continues or revives any appropriation of public or trust money, or property, or releases, discharges or commutes any claim or demand of the State,

or which imposes, continues or revives a tax, shall be passed except by the affirmative vote of a majority of all the members elected to each house, the vote to be by the yeas and nays, and the names of the members voting for and against, entered on the journal. Every law imposing, continuing or reviving a tax shall specifically state such tax and no law shall be construed as so stating such tax which requires a reference to any other law or any other tax. The presiding officer of each house shall, in the presence of the house over which he presides, sign every bill that has been passed by both houses and duly enrolled. Immediately before this is done, all other business being suspended, the title of the bill shall be publicly read. The fact of signing shall be entered on the journal.

Sec. 51. There shall be a joint committee of the General Assembly, consisting of seven members appointed by the House of Delegates and five members appointed by the Senate, which shall be a standing committee on special, private and local legislation. Before reference to a committee, as provided by section Fifty, any special, private, or local bill introduced in either house shall be referred to and considered by such joint committee and returned to the house in which it originated with a statement in writing whether the object of the bill can be accomplished under general law or by court proceeding; whereupon, the bill, with the accompanying statement, shall take the course provided by section Fifty. The joint committee may be discharged from the consideration of a bill by the house in which it originated in the manner provided in section Fifty for the discharge of other committees.

Sec. 52. No law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, but the act revived or the section amended shall be re-enacted and published at length.

Sec. 53. No law, except a general appropriation law, shall take effect until at least ninety days after the adjournment of the session of the General Assembly at which it is enacted, unless in case of an emergency (which

emergency shall be expressed in the body of the bill), the General Assembly shall otherwise direct by a vote of four-fifths of the members voting in each house, such vote to be taken by the yeas and nays, and the names of the members voting for and against entered on the journal.

Sec. 63. The General Assembly shall confer on the courts power to grant divorces, change the names of persons, and direct the sale of estates belonging to infants and other persons under legal disabilities, and shall not, by special legislation, grant relief in these or other cases of which the courts or other tribunals may have jurisdiction. The General Assembly may regulate the exercise by courts of the right to punish for contempt. The General Assembly shall not enact any local, special, or private law in the following cases:

1. For the punishment of crime.

2. Providing a change of venue in civil or criminal cases.

3. Regulating the practice in, or the jurisdiction of, or changing the rules of evidence in any judicial proceedings or inquiry before, the courts or other tribunals, or providing or changing the methods of collecting debts or enforcing judgments, or prescribing the effect of judicial sales of real estate.

4. Changing or locating county seats.

5. For the assessment and collection of taxes, except as to animals which the General Assembly may deem dangerous to the farming interests.

6. Extending the time for the assessment or collection of taxes.

7. Exempting property from taxation.

8. Remitting, releasing, postponing, or diminishing any obligation or liability of any person, corporation, or association, to the State or to any political subdivision thereof.

9. Refunding money lawfully paid into the treasury of the State or the treasury of any political subdivisions thereof.

10. Granting from the treasury of the State, or granting or authorizing to be granted from the treasury of any

political subdivision thereof, any extra compensation to any public officer, servant, agent, or contractor.

11. For conducting elections or designating the places of voting.

12. Regulating labor, trade, mining or manufacturing, or the rate of interest on money.

13. Granting any pension or pensions.

14. Creating, increasing, or decreasing, or authorizing to be created, increased, or decreased, the salaries, fees, percentages, or allowances of public officers during the term for which they are elected or appointed.

15. Declaring streams navigable, or authorizing the construction of booms or dams therein, or the removal of obstructions therefrom.

16. Affecting or regulating fencing or the boundaries of land, or the running at large of stock.

17. Creating private corporations, or amending, renewing, or extending the charters thereof.

18. Granting to any private corporation, association, or individual any special or exclusive right, privilege or immunity.

19. Naming or changing the name of any private corporation or association.

20. Remitting the forfeiture of the charter of any private corporation except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this Constitution and the laws passed in pursuance thereof.

Sec. 64. In all the cases enumerated in the last section, and in every other case which, in its judgment, may be provided for by general laws, the General Assembly shall enact general laws. Any general law shall be subject to amendment or repeal, but the amendment or partial repeal thereof shall not operate directly or indirectly to enact, and shall not have the effect of the enactment of a special, private, or local law.

No general or special law shall surrender or suspend the right and power of the State, or any political subdivision thereof, to tax corporations and corporate property, except as authorized by Article Thirteen. No private

corporation, association, or individual shall be specially exempted from the operation of any general law, nor shall its operation be suspended for the benefit of any private corporation, association, or individual.

104. *State* v. *Covington*[1]

McIlvaine, J. It is also contended that the act in question is in violation of section 16 of article 2, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title," etc. . . . We think there is but one subject embraced in this act. . . .

If, however, it were otherwise, we would follow the decisions of this court heretofore made, and hold that the provision of the constitution above cited is directory, and not mandatory. . . .

In holding this provision to be directory, we do not mean, however, to be understood as saying that it is without obligatory force. On the contrary, it is a direction to the general assembly, which each member, under the solemn obligation of his official oath, is bound to observe and obey. To the legislator it is of equal obligation with a mandatory provision. The difference between a mandatory and directory provision is this, and nothing more; the former avoids, the latter does not. This is a rule of decision, and is based on grounds of expediency. The rule is amply recognized by all courts of law, and the reason of the rule is this, that less injury results to the general public by disregarding than by enforcing the letter of the law. . . .

105. *People* ex rel. *Carter* v. *Rice*[2]

Peckham, J. We are asked to say that in this act of 1892 the legislature has abused or overstepped the discretion devolved upon it by the Constitution. What is the result which would follow?

In the first place we should have every enumeration and every apportionment act brought before the courts

[1] Supreme Court of Ohio, 1876. 29 Ohio State Reports, 102.
[2] Court of Appeals of New York, 1892. 135 New York, 473.

for review, and as it would not be necessary to act immediately, any citizen at any time during the running of the decennial period would have the right to invoke the aid of the court to set aside as void any such act, and leave the people to suddenly confront such a situation as is now presented. This in itself is sufficient to induce a court to say that only in a case of plain and gross violation of the spirit and letter of the Constitution should such a power be exercised. Every county in the state but the two before us has acquiesced in the requirements of the act, apportioned its members among the towns and wards of the county or city, and done everything necessary to proceed to an election under its provisions. The greatest confusion and disorder would result from a holding that this act is invalid. Whether any members of assembly could actually be elected under any other law at this late day is quite problematical. The spectacle of a legislature elected under an unconstitutional law, or part of the members elected under it and part under another, is one which ought not to be contemplated without the greatest anxiety by all honest citizens.

When we come to the question of what law is in force in this state if the law of 1892 is not, the situation becomes most alarming. In the case of the relator Carter we are asked to command the secretary of state to issue notices for the election of members under the act of 1879. This act, if enforced now, would work still greater injustice than has ever been suggested against the act of 1892.

The same reasoning which would set aside as void the act of 1892 would be still more powerful and cogent as showing the total invalidity of the act of 1879. That act, when passed, was well known to be a most unjust and unequal one, particularly in regard to the interests of New York and Kings counties. Governor Robinson, in his memorandum filed with the act, which he refused to approve, shows beyond question its disregard of the constitutional mandate as to equality. The governor therein called particular attention to the matter and said: "In the distribution of members of assembly the bill is

still further from meeting the requirements of the Constitution. I find that Cattaraugus county, with 45,737 inhabitants, has two members, while Suffolk, with 50,330, is given but one. Orange, with 82,225 inhabitants, has but two members, while St. Lawrence, with only 78,014, gets three. Nor can I understand the philosophy which gives to the latter county, with 78,000 inhabitants, the same representation as Monroe, which exceeds it in population by nearly 50,000. These discrepancies are not to be explained. They admit of no apology or excuse. They are of the same class as that so-called necessity which entirely deprives 150,000 inhabitants in New York and Kings of their proper representation." So wrote Governor Robinson while refusing to veto the act, because as it stood it was better than the condition of things which it was to replace. Should this court now after thirteen years, and when the injustice and inequality have vastly increased, still order the secretary of state to issue election notices under such a law and should a legislature be elected under it? It is said in answer that we need not decide upon the invalidity of the act of 1879, but leave it to the secretary of state what course to pursue and what law to regard, so long as he does not regard the act of 1892. This is as it seems to us a most absurd proposition and at the same time one fraught with the most alarming contingencies. To hold the act of 1892 void for this reason and yet to say nothing in regard to the law of 1879, which is far more obnoxious to the very arguments upon which we are asked to avoid the act of 1892, is to place the people of the whole state in a most improper and unfair position.

The necessity of deciding is also founded upon the petition of the relator in the case against Rice, that he shall be ordered to give notices under the act of 1879. The question will arise at once, what act are we living under and what apportionment is the true one upon which to base election of members of assembly? The people are entitled to know what law they are living under, and where the apportionment is to be found which is legal and under which they could proceed to elect members if

there were time enough left in which to put the machinery at work to accomplish that end. But there is not, in fact, time enough left for such purpose.

If the act of 1892 is void, the act of 1879 is also plainly void and no election of members of assembly should be tolerated under it. This might relegate the people to the act of 1866, and thus we might have an attempt at an election for members of assembly under an act more than a quarter of a century old and a legislative representation of the people of that time. This would be a travesty on the law and upon all ideas of equality, propriety and justice. . . .

106. *State* ex rel. *Attorney General* v. *Cunningham*[1]

Orton, J. The constitution provides that "the legislative power shall be vested in a senate and assembly." Art. IV, sec. 1. These bodies can only exercise this power rightfully when they are created and established according to the constitution. When thus organized, they may exercise this high prerogative of legislation. But if they have not been created according to the constitution, they are foreign, usurping bodies, that cannot rightfully exercise this great power; and to that extent the state government is revolutionized and emasculated of this high prerogative. The constitution further provides the manner in which these bodies may be formed: *First.* "The legislature shall apportion and district anew the members of the senate and assembly after each enumeration according to the number of inhabitants" (with certain exceptions). *Second.* The assembly "districts are to be bounded by county, precinct, town, or ward *lines*, to consist of contiguous territory, and be in as compact form as practicable." *Third.* The senate districts must be "of convenient and contiguous territory," and shall not divide assembly districts. *Fourth.* The members of the senate and assembly must be elected by single districts thus formed. This is the only method prescribed by the constitution for the creation of the legislature of the state.

[1] Supreme Court of Wisconsin, 1892. 81 Wisconsin, 440.

A legislative body formed in violation of these constitutional restrictions is a body unknown to the constitution, and cannot rightfully exercise this high prerogative of legislation. It is said that these restrictions have nearly all been violated by an attempted creation of future legislatures. It would seem that these legislative prerogatives of the state now require the interposition of this highest judicial tribunal to preserve them. . . .

But, again, this apportionment act violates and destroys one of the highest and most sacred rights and privileges of the people of this state, guaranteed to them by the Ordinance of 1787 and the constitution, and that is "*equal* representation in the legislature." This also is a matter of the highest public interest and concern to give this court jurisdiction in this case. If the remedy for these great public wrongs cannot be found in this court it exists nowhere. It would be idle and useless to recommit such an apportionment to the voluntary action of the body that made it. But it is sufficient that these questions are judicial and not legislative. The legislature that passed the act is not assailed by this proceeding, nor is the constitutional province of that equal and co-ordinate department of the government invaded. The law itself is the only object of judicial inquiry, and its constitutionality is the only question to be decided.

The particulars in which the constitution has been violated by this act will be more fully considered by my brethren. It is proper to say that *perfect exactness* in the apportionment according to the number of inhabitants is neither required nor possible. But there should be as close an approximation to *exactness* as possible, and this is the utmost limit for the exercise of legislative discretion. If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion, and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment, then the conclusion is in-

evitable that the legislature did not use any judgment or discretion whatever. The above disparity in the number of inhabitants in the legislative districts is so great that it cannot be overlooked as mere careless discrepancies or slight errors in calculation. The differences are too material, great, and glaring, and deprive too many of the people of the state of all representation in the legislature, to be allowed to pass as mere errors of judgment. They bear upon their face the intrinsic evidence that no judgment or discretion was exercised, and that they were made intentionally and wilfully for some improper purpose or for some private end foreign to constitutional duty and obligation. It is not an "apportionment" in any sense of the word. It is a direct and palpable violation of the constitution. The breaking up of the lines and boundaries of counties by the new assembly districts must have been intentional. It was not necessary in a single instance, and there is no possible margin for the exercise of any legislative discretion. This is a most important restriction on the power of the legislature to make an apportionment. The people have a commendable pride in their own counties, and have more or less a common feeling and interests, and participate together in all their county affairs. They have a right to be represented by their own members of the legislature, and the members themselves can better represent them and promote and protect their interests. They know each other, and have closer relations with each other. These considerations, though common, must not be underrated or overlooked. When these restrictions were under discussion in the constitutional convention, they were supported and adopted upon the express ground that they would prevent the legislature from *gerrymandering* the state. These restrictions were regarded by the very able members of the convention as absolutely necessary to secure to the people that sacred right of a free people,—of equal representation in the legislature. The right of the people to make their own laws through their own representatives, so fundamental in and essential to a free government, the convention sought to guard by these restrictions. That

most dangerous doctrine, that these and other restrictions upon the power of the legislature are merely *declaratory*, and not *mandatory*, should not be encouraged even to the extent of discussing the question. . . .

CHAPTER XXXV

THE STATE EXECUTIVE

It should be kept in mind that there is a great difference between the presidency of the United States and the governorship of a State. The President is the head of the national administrative system, controlling and directing, through responsible subordinates, the vast machinery of the Federal Government. Through his power of appointment and removal, combined with the authority bestowed upon him by Congress, he can give genuine effect to the mandate "to take care that the laws be faithfully executed."

The governor, on the other hand, is in most cases merely one of a group of executive officers elected by the people. He must share executive power with these officers and has practically no legal control over them. If, as occasionally happens, they are of a different political party, they may deliberately cripple his administration. The legislature creates administrative offices. The recent tendency has been to provide that they be filled by the governor, but in many cases they are filled by the secretary, the auditor, or some other elective official. In the vitally important matter of law enforcement, the governor seldom has adequate authority and is often compelled to witness the nullification of State law by elective county or municipal officers. The State constitutions, as a rule, specify minutely the powers of the governor and other executive officers, and as the following decisions will show, these powers are narrowly construed by the courts. Yet, to quote the complaint of a recent governor of Indiana: "The acts of the governor are under the constant and critical scrutiny of the public. He is charged with the failures in practically all matters of administration, although under our present governmental organization he is without authority to act in many instances where he is now held responsible."

107. *A Typical State Executive Department* [1]

SECTION 1. There shall be elected at each general biennial election a governor, a lieutenant governor, a secretary of state, a state treasurer, a commissioner of the state land office, an auditor general and an attorney general, for the term of two years. They shall keep their offices at the seat of government, superintend them in

[1] The Constitution of Michigan, Article VI. Adopted by the Constitutional Convention, February 21, 1908, and ratified by the electors, November 3, 1908.

person and perform such duties as may be prescribed by law. The office of commissioner of the state land office may be abolished by law.

SEC. 2. The chief executive power is vested in the governor.

SEC. 3. The governor shall take care that the laws be faithfully executed; shall transact all necessary business with the officers of government; and may require information in writing from all executive and administrative state officers, elective and appointive, upon any subject relating to the duties of their respective offices.

SEC. 4. He shall be commander-in-chief of the military and naval forces, and may call out such forces to execute the laws, to suppress insurrection and to repel invasion.

SEC. 5. He shall communicate by message to the legislature, and at the close of his official term to the incoming legislature, the condition of the state, and recommend such measures as he may deem expedient.

SEC. 6. He shall issue writs of election to fill such vacancies as occur in the senate or house of representatives.

SEC. 7. He may convene the legislature on extraordinary occasions.

SEC. 8. He may convene the legislature at some other place when the seat of government becomes dangerous from disease or a common enemy.

SEC. 9. He may grant reprieves, commutations and pardons after convictions for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to regulations provided by law relative to the manner of applying for pardons. Upon conviction for treason, he may suspend the execution of the sentence until the case shall be reported to the legislature at its next session, when the legislature shall either pardon or commute the sentence, direct the execution of the sentence or grant a further reprieve. He shall communicate to the legislature at each session information of each case of reprieve, commutation or pardon granted and the reasons therefor.

SEC. 10. Whenever a vacancy shall occur in any of

the state offices, the governor shall fill the same by appointment, by and with the advice and consent of the senate, if in session.

SEC. 11. All official acts of the governor, except his approval of the laws, shall be authenticated by the great seal of the state, which shall be kept by the secretary of state.

SEC. 12. All commissions issued to persons holding office under the provisions of this constitution shall be in the name and by the authority of the people of the state of Michigan, sealed with the great seal of the state, signed by the governor and countersigned by the secretary of state.

SEC. 13. No person shall be eligible to the office of governor or lieutenant governor who shall not have attained the age of thirty years and who has not been five years a citizen of the United States and a resident of this state two years next preceding his election.

SEC. 14. No member of congress nor any person holding office under the United States or this state shall execute the office of governor, except as provided in this constitution.

SEC. 15. No person elected governor or lieutenant governor shall be eligible to any office or appointment from the legislature, or either house thereof, during the time for which he was elected. All votes for either of them for any such office shall be void.

SEC. 16. In case of the impeachment of the governor, his removal from office, death, inability, resignation or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the disability ceases. When the governor shall be out of the state at the head of a military force thereof, he shall continue commander-in-chief of all the military force of the state.

SEC. 17. During a vacancy in the office of governor, if the lieutenant governor die, resign, or be impeached, displaced, be incapable of performing the duties of his office, or absent from the state, the secretary of state shall act as governor until the vacancy be filled or the disability cease.

SEC. 18. The lieutenant governor or secretary of state, while performing the duties of governor, shall receive the same compensation as the governor.

SEC. 19. The lieutenant governor shall be president of the senate, but shall have no vote.

SEC. 20. The secretary of state, state treasurer and commissioner of the state land office shall constitute a board of state auditors. They shall examine and adjust all claims against the state not otherwise provided for by general law. They shall constitute a board of state canvassers to determine the result of all elections for governor, lieutenant governor, state officers and such other officers as shall by law be referred to them. They shall act as a state board of escheats and a board of fund commissioners. They shall perform such other duties as may be prescribed by law. In case the office of commissioner of the state land office is abolished, another state officer shall be designated by law as a member of the several boards mentioned in this section.

SEC. 21. The governor and attorney general shall each receive an annual salary of five thousand dollars. The secretary of state, state treasurer, commissioner of the state land office and auditor general shall each receive an annual salary of twenty-five hundred dollars. They shall receive no fees or perquisites whatever for the performance of any duties connected with the offices. It shall not be competent for the legislature to increase the salaries herein provided.

THE VETO POWER, ARTICLE V

SEC. 36. Every bill passed by the legislature shall be presented to the governor before it becomes a law. If he approve, he shall sign it; if not, he shall return it with his objections to the house in which it originated, which shall enter the objections at large upon its journal and reconsider it. On such reconsideration, if two-thirds of the members elected agree to pass the bill, it shall be sent with the objections to the other house, by which it shall be reconsidered. If approved by two-thirds of the members elected to that house, it shall become a law.

In such case the vote of both houses shall be determined by yeas and nays and the names of the members voting for and against the bill shall be entered on the journals of each house, respectively. If any bill be not returned by the governor within ten days, Sundays excepted, after it has been presented to him, it shall become a law in like manner as if he had signed it, unless the legislature, by adjournment, prevents its return, in which case it shall not become a law. The governor may approve, sign and file in the office of the secretary of state within five days, Sundays excepted, after the adjournment of the legislature any bill passed during the last five days of the session, and the same shall become a law.

SEC. 37. The governor shall have power to disapprove of any item or items of any bill making appropriations of money embracing distinct items; and the part or parts approved shall be the law; and the item or items disapproved shall be void, unless re-passed according to the rules and limitations prescribed for the passage of other bills over the executive veto.

108. *The Nature of the Executive Power*[1]

Some of the state constitutions, including those of New York, New Jersey, Maryland, Indiana and Wisconsin, follow the language of the United States Constitution and declare that "the executive power shall be vested in a governor." This is a verbal inaccuracy for "the executive power" is in reality vested not only in a governor but also in various other officers and boards, established by the constitution or by statute. It is not strictly accurate to speak of the governor as *the* head of the administration, for there are many such heads, though the governor is usually the most important and conspicuous head. The majority of the state constitutions recognize this distinction by providing that "the supreme (or chief) executive power shall be vested in a governor."

[1] John M. Mathews, *Principles of American State Administration*, 79–80. Reprinted by permission of D. Appleton and Company, New York City.

It will thus be seen that the word "supreme," as here used, operates to limit rather than to extend the governor's power. It implies that, though the supreme or highest executive power is vested in the governor, there are also subordinate executive powers vested in other officers, over whom the governor may not necessarily exercise any control.

109. Ex parte *Holmes*[1]

There are no powers incident to the executive character of a chief magistrate of this state, unless they are obviously necessary to carry into effect some of the powers expressly given. The extreme jealousy with which the royal governor had been viewed, previous to the revolution, and the powers which they claimed and exercised as the representatives of the king, led those who formed the American constitutions to define with accuracy the extent and nature of the functions of the executive, while they were willing to give almost unlimited power to the legislature. Restrictions on the legislature were not generally thought of, at the time, and they have been adopted since, rather from the construction of expressions which were probably designed to have a very limited effect, than from anything expressly declared. In our constitution, while the supreme executive power is given to the governor, its extent is declared in another clause of the constitution. In relation to other states, he is only to correspond. In criminal jurisprudence, he can pardon, except in cases of murder where he can only reprieve. He may prepare such business as may appear to him necessary to lay before the general assembly, and may expedite the execution of such measures as may be resolved upon by them. He is to take care that the laws be faithfully executed. To the legislature, while extensive and general authority is delegated, there is also given "all the powers necessary for the legislature of a free and sovereign state."

[1] Supreme Court of Vermont, 1834. 12 Vermont, 643.

110. *Field* v. *People*[1]

Chief Justice Wilson delivered the opinion of the Court.

The case then resolves itself into the single question, Does the Governor possess the constitutional power of removing from office the Secretary of State, and appointing a successor, at will? In deciding this question, recurrence must be had to the Constitution. That furnishes the only rule by which the Court can be governed. That is the charter of the Governor's authority. All the powers delegated to him by, or in accordance with that instrument, he is entitled to exercise, and no others. The Constitution is a limitation upon the powers of the legislative department of the government but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power, except such as is clearly granted by the Constitution. . . .

As the right of the Governor to remove the Secretary must be granted by the Constitution, or it does not exist, it therefore devolves upon those who advocate the claim of the executive power to show the grant upon which it is founded; to point out the clause and section of the Constitution from which it is derived. How has this been done? Has any express grant been produced? No; it is not pretended that any express grant is to be found in the Constitution. But it is contended that the power in question is granted to the Governor by implication. That from the grant of other powers, this one of removing the Secretary from office is necessarily implied, as the means of rendering those grants available; and the following clauses of the Constitution are relied on in support of this position:

"*Article I*

"Section 1. The powers of the government of the State of Illinois shall be divided into three distinct departments, and each of them be confided to a separate

[1] Supreme Court of Illinois, 1840. 3 Illinois, 79.

body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another and those which are judiciary, to another.

"Section 2. No person or collection of persons being one of those departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

"Article III

"Section 1. The executive power of the State shall be vested in a Governor. . . .

"Section 7. He may require information in writing from the officers in the executive department, upon any subject relating to the duties of their respective offices, and shall take care that the laws be faithfully executed. . . .

"Section 20. The Governor shall nominate, and by and with the advice and consent of the Senate appoint, a Secretary of State, who shall keep a fair register of the official acts of the governor, and when required, shall lay the same, and all papers, minutes, and vouchers relative thereto, before either branch of the General Assembly, and shall perform such other duties as shall be assigned him by law." . . .

The next grant of power relied on is, that "The executive power of the State shall be vested in a Governor." This clause is treated by the Court below as conferring numerous and ample powers upon the Governor. All that are usually denominated executive powers, by theoretical writers, are supposed to be included in this grant to the Governor, except such as are expressly conferred upon other departments. This, I think, I shall be able to show is a mistaken view of the subject. This clause, like the preceding ones, is a declaration of a general rule; and the same remarks are applicable to this, as a grant of power, that have been made in reference to them. It confers no specific power. What would have been its operation, if the Constitution had contained no specific enumeration of executive powers, is a very different question from that now presented, and might have admitted

of a different answer. But it has been settled by the Supreme Court of the United States that an enumeration of the powers operates as a limitation and restriction of a general grant. . . .

The authority of the Governor to require information from the officers in the executive department, relative to the business of their respective offices, and the obligation of the Secretary to keep a register of his official acts, are relied upon, in connection with the injunction that the Governor shall see that the laws are faithfully executed, as implying an authority in him to dismiss the Secretary. . . .

If the right to require information from an officer implied the right to remove him, the legislature would have the power not only to remove the Governor, but a power, concurrent with him, to remove all the officers in the executive department; for the legislature has, under its general powers, authority to call on all of them for official information. . . .

But it is argued from the Secretary's obligation to register the official acts of the Governor, and, when required, to give him official information that such an official intercourse of confidence must exist as to imply an authority in the Governor to remove the Secretary. . . .

But neither in contemplation of law, nor in fact, is there any official confidential intercourse between the Governor and the Secretary, or other officers of the executive departments. He may call upon them for information relative to matters connected with their offices. He may, for example, enquire of the Treasurer, of the Auditor, what amount of warrants are outstanding, and of the Secretary, what are the kind and number of commissions to which he has put the State seal; or whether the laws are all distributed, etc. These are all public matters, in reference to which there can be neither secrecy nor confidence and it is only in relation to such that the Governor can require information. He has no right to the opinion or advice of the Secretary, as to the legality or propriety of measures of any kind; and as all the duties of the Secretary are prescribed by law, and as it is only

in relation to them that he can be required to give information, there cannot, therefore, in the nature of things, be any implication of confidence from communications relative to a public law or to matters of fact recorded for public information.

The reasoning in favor of the Governor's authority to remove the Secretary, because of the latter's duty to register his official acts, can have no application to the Secretary of State, an officer whose office is created, and whose duty to keep a register of the acts of the Governor is prescribed by the Constitution. In the performance of this, as of other duties, he does not act as the Governor's officer, subject to his control and direction, but as the officer of the Constitution, bound to the performance of such duties only as have been assigned by that instrument and the law. . . .

The injunction, that the Governor shall see that the laws are faithfully executed, it is also urged, gives him the control, and consequently the power of removal of the officers of the executive department. This interference is not justified by the premises. It has neither the sanction of authority nor the practice of other State executives, both of which are opposed to it. The practice of the President, as I will show, is founded upon other grounds, and his power does not extend to the removal of any officers whose offices are created by the Constitution, and whose duties are regulated by law. . . . The manifest intention of the Constitution, and the authority cited, in the absence of all precedent and principle militating against it, would seem to be conclusive against the executive claim of power, under this provision, to direct the Secretary how he shall execute the duties assigned him by law; and if he has no power to direct him how he shall execute his duties, he certainly has no power to dismiss him for not conforming to his directions. . . .

The Constitution of the United States and of this State contain the same declarations that the executive powers of the government shall be vested in the respective executives; and in the Constitution of the first, this declaration is carried out by its other provisions. It creates no other

officers in whom a portion of this power is vested or required to be vested by law. Those officers whom the President may remove are created by law, as aids and helps to him in the performance of his duties. But the declaration in our Constitution, that the executive power of the government shall be vested in the Governor, is to be understood in a much more limited sense; inasmuch as, by its other provisions, it is greatly circumscribed and narrowed down. Unlike the Constitution of the United States, ours has created other executive officers, in whom a portion of this power is required to be vested by law, not to be assigned by the Governor. . . .

The Governor is, neither in fact nor in theory, personally nor politically responsible for the official conduct of the Secretary, or any other officer. He cannot assign him the performance of a single duty or control him in the performance of those assigned by law. He does not move in the executive circle, as has been said, but in that marked out by the Constitution and by the law, separate, distinct from, and independent of, that of the Governor. He looks to the law for his authorities and duties, and not to the Governor; and to that, and to that alone, he is responsible for their performance. . . .

CHAPTER XXXVI

THE STATE ADMINISTRATIVE DEPARTMENT

"The State," said Governor Frank O. Lowden in his message to the Illinois legislature of 1917, "has become more complex. Its sphere of action has been increased. The police power has been extended. . . . No occupation, trade or employment has escaped. . . . Administrative agencies have been multiplied in bewildering confusion. . . . They have been created without reference to their ability economically and effectively to administer the laws. We are confronted with a problem requiring solution, and then we pass the problem on to a commission and felicitate ourselves that we have solved the problem. . . . The progress needed most now is progress in administration."

The lack of logical and orderly arrangement in State administrative machinery has been responsible for a great deal of waste and inefficiency. The common functions of State administration are outlined in the following article on State boards and administration. Governor Russell's discussion of the Massachusetts situation in 1892 is one of the pioneer criticisms of a condition which still persists in a great majority of the States and which twenty-five years later led Governor Capper to describe the Kansas administrative organization as "a hodge-podge; a patchwork; antiquated, cumbersome, wasteful, inefficient; entirely out of keeping with the more scientific systems of business now employed by private concerns."

Since 1917 numerous States have accomplished extensive reforms, partly because of steadily growing interest in scientific administrative methods, and partly because the growing tax burden has led to a search for possible economies. Similar reform in the Federal administrative organization has been repeatedly advocated by leaders of both political parties.

111. *The Fourth Department of Government* [1]

In the national administration, the heads of the departments are completely subordinate to and dependent upon the chief executive authority as a result of the precariousness of their tenure, and will be in harmony one with the other and with the President on account of the fact that they have been chosen by him to fill their re-

[1] Frank J. Goodnow, *The Principles of the Administrative Law of the United States*, 130–131. Reprinted by permission of G. P. Putnam's Sons, New York and London.

spective positions as a result of his knowledge of their opinions. We find, therefore, in the national administration complete guaranties for an efficient and harmonious administration under the direction of the President.

In the States, however, the case is quite different. Each head of a department, or office, has, so long as he is not corrupt, the right to conduct the affairs of his department or office just about as he sees fit; and is practically independent of the governor, who has little or no influence over affairs of administration. The constitutions of some of the States have been honest enough to recognize what is the real position of the governor and what is that of the heads of the departments, and devote an article to the consideration of the "administrative" officers of the State, among whom the governor is not included. But whether the constitution recognizes this or not, the fact is the same, *viz.*, that the governor is not the head of the administration in the States of the American Union. American state administrative law has added to the famous trinity of Montesquieu a fourth department, *viz.*, the administrative department, which is almost entirely independent of the chief executive, and which, as far as the central administration is concerned, is assigned to a number of officers not only independent of the governor but also independent of each other. . . .

112. *State Boards and Commissions*[1]

In America, for a hundred years before the Civil War, the governmental questions uppermost in men's minds were chiefly, though not exclusively, constitutional: since the war they have been mainly administrative. That is to say, prior to the Civil War questions of independence, of the interrelationship of governmental departments, of State rights, of suffrage, occupied most attention; while, since the reconstruction period, interest has been centred on the relations of the State to great corporations, on capital and labor in their industrial struggles, on State

[1] F. H. White, "The Growth and Future of State Boards and Commissions," in *The Political Science Quarterly*, December, 1903. Reprinted by permission.

aid in the development of the country's resources, on the methods and measure of taxation, on the protection of the health and morals of the people, and on the furthering of educational, industrial, and philanthropic enterprises. The problems here have been largely those of administration,—of efficient exercise of power by governmental agencies.

This increased administrative activity has sometimes found expression in laws general in character and requiring no special machinery for their execution; but more frequently a special need—industrial, scientific, educational, philanthropic—has called into existence a special organ of government to supervise, aid, or manage the affair. This is the source of those boards and commissions which have in late years become prominent in all the States but more particularly in those having the most complex and highly developed industrial organization. These bodies are the latest product of governmental evolution. They have developed since the Civil War, many of them during the last two decades; and a study of their form and action will reveal the tendencies of governmental progress, and the advance already made in certain directions toward paternalism and State socialism. . . .

As to the distribution of the commission system through the Union, Massachusetts, the pioneer in adopting the system, distances all the other States in the number of such bodies and in the variety of interests placed under their care. This development, however, has not continued without protest. Illinois stands next. In general, it may be said that the States having highly developed manufacturing and commercial interests lead in the number of such bodies. The exceptions are Kansas and Colorado, which possess a surprising number for States having agriculture or mining as their leading industry. The New England States, with the exception of Maine and Vermont, have a pretty full development of the system, attributable to the influence of Massachusetts and the general similarity of economic and social conditions. The Southern States, as a rule, have but few commissions.

So various are the duties assigned to these bodies that their classification is made very difficult. A careful examination, however, reveals that they may be grouped under the following heads: Industrial, Scientific, Supervisory, Examining, Educational, Executive, Corrective, and Philanthropic.

1. *Industrial.*—Examples of such bodies are to be found in boards of agriculture, dairy and food, horticulture, and inspectors of mines, oil, fish, live stock, grain, steam boilers, steamboats, workshops and factories. . . .

2. *Scientific.*—Boards of health are found in most of the States; bureaus of labor statistics have been established in about one-half; boards of topographical or geological survey in about one-fourth of the States. Other boards and commissions of this general character (public records, forestry, weather service, drainage), and such public officers as vaccine agent and State chemist, are found in but few States. . . .

3. *Supervisory.*—The most conspicuous examples are boards of arbitration, railroad commissions, and commissioners of insurance, inland fisheries, and game. The last three are found in a large number of States, the first in at least eight. Several States are experimenting with boards of inspectors whose duties are to supervise corporations (Massachusetts), gas and gas meters, building and loan companies. . . .

4. *Examining.*—Boards of registration in dentistry, medicine, and pharmacy are found in many of the States. In at least four there is a civil-service board, while several have boards or commissioners whose duties are to examine pilots, veterinarians, undertakers, architects (Illinois), horseshoers (Illinois, Minnesota), barbers (Minnesota), and plumbers (Minnesota). . . .

5. *Educational.*—Boards of control of educational institutions and State boards of education are found in nearly all the States. Connecticut made a unique advance by establishing a board of sculpture, and Massachusetts has set an excellent example by providing for a public-library commission. . . .

6. *Executive.*—The desire on the part of many States

to get something done, to carry through some great enterprise, even though at times it involved the entry of the State on ground supposed to be the exclusive domain of individual enterprise and initiative, has led to the formation of boards and commissions charged with such duties as the following: construction of highways, control of the public printing, selling of liquor (South Carolina), managing great sewerage and water systems, laying out extensive parks, constructing and repairing levees (Louisiana and Mississippi). . . .

7. *Corrective and Philanthropic.*—Under this caption may be grouped such bodies and officers as boards of police and of charity and correction, general superintendent of prisons (Massachusetts), State agent to prevent cruelty to animals (North Dakota). Nearly one-half of the States have State boards of charities. In all the States having institutions for the defective, dependent and delinquent classes there are boards of control. Leaving these out of account, the various bodies or officers under this head, with one exception (Massachusetts, "State Aid"), are the result of attempts to centralize administration in the State government, to supervise and control local authorities. To a certain extent, therefore, they are in opposition to the policy of home rule.

Such work, however, was undertaken reluctantly by the State governments, and only when the abuses under the local governments were too great to be borne. The administration of public charitable institutions, like the almshouses and hospitals for the insane, or corrective institutions, like the jails and prisons, was admittedly bad almost everywhere. This was due sometimes to the poverty of the local communities, but usually to ignorance of actual conditions and to lack of acquaintance with better methods, or to the short-sighted penuriousness of the people of the community. . . .

No one can glance over the foregoing activities of the commissions without remarking their varied and important character. They reflect the complexity of modern life, and suggest the imminence of a government paternalism more far-reaching than our country has known in the past.

It is clear that such delicate and difficult duties as those described can be rightly performed only by experts. Technical training and skill, not party service, must be the criterion for the *personnel* of the commissions. If party service determines, one of two things will happen: either the work will be badly done and great interests will suffer, or else an expert will be employed to do the work that should be done by another, and the State must pay two salaries when one would suffice. The principle here involved has been particularly illustrated in the affairs of our cities. . . .

State commissions, whether composed of several members, usually three or more, as is generally the case, or of only a single commissioner, are constituted through appointment of the members by the governor, subject usually to confirmation by the Senate. Reports are made in some cases to the legislature, in others to the governor.

It frequently happens that the law organizing the commission is so expressed as to give the governor, after making the appointment of its members, no further control over the actions of that body. The power of removal either is denied him, or is hedged about in such a way as to make its exercise practically impossible except for the grossest malfeasance. Often the legislature has granted these commissions almost complete power in their sphere, and placed in their hands the uncontrolled expenditure of large sums of money. On their appointment by the governor they are launched in their orbit with practically no one to restrain or limit their action within the law. The governor's reputation may suffer by their action, yet, as he has practically no power of removal, he is helpless, except so far as he may direct public attention to the wrong-doing. In effect, the commission system establishes a fourth department of government directly responsible neither to the people, for the members are seldom elected; nor to the legislature, for it does not appoint or remove; nor to the governor, for, though he appoints, it is seldom he has the power of removal.

Of the changes that have taken place in the structure and function of the State government during the century,

none seems more striking or more suggestive than the growth of this fourth department of government. Of course, the commissions are intimately connected with the three traditional departments in certain ways,—*e. g.*, appointment, reports, etc.,—and are dependent upon them in an important respect for supplies, etc.; nevertheless, they have a field of their own, an orbit traversed only by themselves. . . .

113. *Divided Responsibility in Massachusetts*[1]

. . . There are to-day in the executive department of the Commonwealth over three hundred officers, commissioners, and trustees, not including clerks and other subordinate officers, participating by statute authority in the administration of our government. There are over twenty-five State commissions (some, however, not purely executive) and more than one hundred trustees of public institutions. Whether this number can be reduced by abolition or consolidation of offices has been considered by a special committee of the last Legislature, who will submit to you the result of its investigation.

In my judgment that question is rather one of detail than of principle, and by no means as important as the question of uniformity and responsibility in the administration of these public trusts. At present there is neither. The tenure of some commissioners and trustees is three years; of others, five; of others, seven; and of one board, eight. This tenure is fixed by law, and gives the occupant a right to hold the office for its full term, in the absence of express statute provision for removal. In many of the statutes there is no such provision, and where it exists there is no uniformity. Members of four commissions and the Medical Examiners can be removed for sufficient cause by the Governor with the consent of the Council; members of eleven commissions can be removed with or without cause by the Governor, but only with the same consent. Only eight officers, outside of the District Police,

[1] Message of Governor William E. Russell to the Legislature of Massachusetts, January 7, 1892.

can be removed by the Governor alone, upon his own responsibility. That is the extent of his effective and responsible executive control. Five boards of trustees are removable "for sufficient cause," but without any provision as to who shall exercise this power. Of the remaining administrative boards and officers appointed for a fixed term, including the Boards of Lunacy and Charity, of Health, of Education, of Prisons, the State members of the Board of Agriculture, and other officers holding important public trusts, there is no power of removal in anybody, except by the cumbrous machinery of impeachment. More than one hundred and twenty important executive officers are thus, during a tenure of office varying from three to eight years, beyond the reach and control of any executive power. All of these officers perform public duties, expend public money, and administer public trusts. In some way they should be made responsible to the people; otherwise there is danger of friction and conflict. Arbitrary acts cannot be controlled, misconduct cannot be punished, nor can any one be held directly and properly responsible for official action.

As an illustration of our irresponsible system I again call the attention of the Legislature to our method of prison management. At present the warden in charge of the prison has no power over his principal subordinates, either in their appointment or removal, except with the concurrence of the Prison Commissioners, with an appeal to the Governor and Council in case of conflict; the commissioners in charge of the institution have no power over the appointment or removal of the warden; and neither the Governor nor any one else has any power over the commissioners. In case of mismanagement, inefficiency, or trouble and insubordination within the prison, such as have occurred in times past, where lies the responsibility or the remedy? In my judgment the warden should be given power over his subordinate officials, the Prison Commissions power over him, and the Governor power over them, and for its exercise, he should answer to the people. . . .

All must agree that the safe and democratic form of

government is to make these administrative officers in some way responsible to the people. . . . In giving to the Legislature authority to create administrative officers, and to fix their tenure, duties, and powers, the constitution contemplated that such authority would be exercised, with due observance of its injunctions, to make such officers accountable to the people and to preserve to the people their power over them.

How can this best be done? It is not practicable to elect them. They must be appointed; and, to be responsible to the people they should be under the control of the elected servants of the people. They cannot be made responsible directly to the Legislature, for this is expressly forbidden by the constitution. The Legislature which created the office can abolish it; but responsibility dependent upon such remedy involves destruction of the administrative machinery whenever a particular administrator is inefficient or unfaithful. There remains only its power of impeachment, restricted to cases of "misconduct and maladministraction in office." This involves trial and conviction upon formal charges, and requires so much time and effort that it cannot be an effective and constant means of making administrators responsible to the people.

The power of removal, as a necessity for responsible control, must then be vested in the executive department; and I submit that it can best be vested in the head of that department. Our constitution, in creating his office, declared that he "shall be a supreme executive magistrate"; and further, "that he should in all cases act with freedom for the benefit of the public." It nowhere limits his executive supervision of executive work, nor suggests that his direct and immediate responsibility to the people should be lessened by statutory creation of departments, boards, and offices beyond his control. If they are not within his control, they are beyond that of the people. . . .

Such divided responsibility, or no responsibility, is the system of executive management established in this commonwealth wholly by statute law, mostly of recent enactment. . . .

114. *Divided Responsibility in New York*[1]

It is sufficient in passing to note that there are five departments and numerous independent boards having authority over the custody of the state parks, reserves and places of interest; that there are more than seven departments assessing and collecting taxes, one of which audits its own collections; more than ten departments of an engineering character; numerous separate and distinct control and visiting departments, boards and commissions for the correctional, insane and charitable institutions; that the legal functions are scattered through ten departments, beside that of the Attorney-General, and that there are numerous administrations of educational institutions. It is quite apparent that a consolidation of many departments or bureaus should be brought about. . . .

The existing system of administration stands condemned by its obviously objectionable features. It is a vast business enterprise divided into more than one hundred and eighty different parts each running along its own lines, without a responsible head. The Constitution says that the executive power shall be vested in the Governor, but at the same time the Constitution and the laws strip him of the instruments for exercising that power. The officers, commissioners and agents who do the business of the state are not responsible to one authority; they are appointed and removed by many different methods. Their terms overlap and their tenures vary. No Governor can be held responsible for the policies and conduct of high officers whom he does not appoint and whom he can not remove. It is clear that if New York wants a retrenchment and efficient government it must make some one responsible who can be held to account and give him power commensurate with his obligations. There is no other way. . . .

[1] *Report of Reconstruction Commission*, 1919, 7–8.

115. *Administrative Reorganization in New York*[1]

Sec. 2. There shall be the following civil departments in the state government: first, executive; second, audit and control; third, taxation and finance; fourth, law; fifth, state; sixth, public works; seventh, architecture; eighth, conservation; ninth, agriculture and markets; tenth, labor; eleventh, education; twelfth, health; thirteenth, mental hygiene; fourteenth, charities; fifteenth, correction; sixteenth, public service; seventeenth, banking; eighteenth, insurance; nineteenth, civil service; twentieth, military and naval affairs.

Sec. 3. At the session immediately following the adoption of this article the legislature shall provide by law for the appropriate assignment, to take effect not earlier than the first day of July, one thousand nine hundred and twenty-six, of all the civil, administrative and executive functions of the state government, to the several departments in this article provided. Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, officers, boards or commissions continued or created under this constitution, and increase, modify or diminish their powers and functions. No specific grant of power herein to a department shall prevent the legislature from conferring additional powers upon such department. No new departments shall be created hereafter, but this shall not prevent the legislature from creating temporary commissions for special purposes and nothing contained in this article shall prevent the legislature from reducing the number of departments as provided for in this article, by consolidation or otherwise. The elective state officers in office at the time this article as amended takes effect shall continue in office until the end of the

[1] From amendment to Article V of the New York constitution, adopted November 3, 1925. The amendment abolished several constitutional offices including the elective offices of Secretary, Treasurer, and Engineer. Section 11 of Article VIII was also amended by providing a new system of visitation and inspection for institutions for mental defectives, or institutions used for the detention of sane adults charged with or convicted of crime, or detained as witnesses or debtors.

terms for which they were elected. Pending the assignment of the civil, administrative and executive functions by the legislature pursuant to the directions of this section, the powers and duties of the several departments, boards, commissions and officers now existing are continued. Subject to the power of the legislature to reduce the number of officers, when the powers and duties of any existing office are assigned to any department, the officers exercising such powers shall continue in office in such department, and their term of office shall not be shortened by such assignment.

Sec. 4. The head of the department of audit and control shall be the comptroller and of the department of law, the attorney-general. The head of the department of education shall be the regents of the university of the state of New York, who shall appoint and at pleasure remove a commissioner of education to be the chief administrative officer of the department. The head of the department of agriculture and markets shall be appointed in a manner to be prescribed by law. Except as otherwise provided in this constitution, the heads of all other departments and the members of all boards and commissions mentioned in this article, excepting temporary commissions for special purposes, shall be appointed by the governor by and with the advice and consent of the senate and may be removed by the governor, in a manner to be prescribed by law.

CHAPTER XXXVII

THE LEGAL POSITION OF MUNICIPAL CORPORATIONS

The municipal corporation is a creature of the State. Its charter may be amended or revoked by the legislature, unless given special protection by the terms of the State constitution. Unlike the private corporation it does not enjoy the protection of the clause in the Federal Constitution forbidding the State to pass laws impairing the obligation of contract. The State cannot, of course, be expected to allow the establishment within its limits, of governmental units which would, under such a guarantee, be practically independent of supervision and control. The power of legislatures over city governments, however, has been subject to many abuses. State constitutions as a result contain a wide variety of prohibitions as to local and special legislation. Attempts have been made to protect the cities from undue interference, by classifying them according to population and then permitting legislation for particular classes. This has proved an unsatisfactory plan, being either a barrier to legitimate action for individual cities, or a means of evasion by unscrupulous legislatures. The Ohio Constitution of 1912 provides a less rigid system. By enlarging the powers of the municipality and providing a less exact enumeration, the opportunity for legislative interference has been considerably reduced, although the supremacy of the State remains unimpaired. While the tendency in recent years has been in the direction of greater home rule for cities, they are still greatly restricted, with the result that the legislatures are besieged at every session with requests for permissive legislation for individual cities.

Municipal ordinances are constantly contested before the courts on the ground that their passage, under the laws of the State and the terms of the charter, was beyond the competence of the city council.

116. *Commissioners of Laramie County* v. *Commissioners of Albany County*[1]

Mr. Justice Clifford delivered the opinion of the court.

Counties, cities and towns are muncipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides. Beyond doubt, they are, in general, made bodies politic and corporate; and are usually invested with cer-

[1] Supreme Court of the United States, 1875. 92 United States, 307.

tain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State.

Trusts of great moment, it must be admitted, are confided to such municipalities, and, in turn, they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature; but it is settled law that the legislature, in granting it, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted. Unless the Constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic or unjust, and even abolish the municipality altogether, in the legislative discretion. . . .

Corporations of the kind are properly denominated public corporations, for the reason that they are but parts of the machinery employed in carrying on the affairs of the State; and it is well settled law, that the charters under which such corporations are created may be changed, modified, or repealed, as the exigencies of the public service or the public welfare may demand. . . .

Institutions of the kind, whether called counties or towns, are the auxiliaries of the State in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature of the State, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of compact. Instead of that, the constant prac-

tice is to divide large counties and towns, and to consolidate small ones, to meet the wishes of the residents, or to promote the public interests, as understood by those who control the action of the legislature. Opposition is sometimes manifested; but it is everywhere acknowledged that the legislature possesses the power to divide counties and towns at their pleasure, and to apportion the common property and the common burdens in such manner as to them may seem reasonable and equitable. . . .

Such corporations are the mere creatures of the legislative will; and, inasmuch as all their powers are derived from that source, it follows that those powers may be enlarged, modified or diminished at any time, without their consent, or even without notice. They are but subdivisions of the State, deriving even their existence from the legislature. Their officers are nothing more than local agents of the State; and their powers may be revoked or enlarged and their acts may be set aside or confirmed at the pleasure of the paramount authority, so long as private rights are not thereby violated. . . .

117. *The Constitution of Ohio*, 1851

Article II

Sec. 26. All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution. . . .

Article XIII

Section 1. The General Assembly shall pass no special act conferring corporate powers. . . .

Sec. 6. The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power. . . .

118. *The Classification of Cities in Ohio*[1]

In 1878 a new municipal code was adopted with an intricate system of classification, which remained in force until overthrown by the recent decision of the Supreme Court. Cities of the first class were divided into three grades, with a provision for a fourth grade. Villages were divided into two classes. Under this scheme each of the five chief cities was in a grade by itself. But further refinements of classification followed. Grades in the second class were subdivided, until eleven cities had been isolated, each into a grade by itself; while still further specialization was introduced by passing acts with particular population formulas which applied usually to only a single city. Moreover, hundreds of acts have been passed conferring powers on particular municipal corporations *by name.*

119. *The Municipal Crisis of* 1902 *in Ohio*[2]

Shauck, J. The validity of the act is denied because, in the view of counsel for the defendants, it is a special act conferring corporate powers, in violation of the first section of the thirteenth article of the constitution, ordaining that: "The general assembly shall pass no special act conferring corporate powers." Confessedly, if the act is general, it is not within the inhibition of this section. The act is said to be general and not special, because it provides for "the appointment, regulation, and government of a police force in cities of the third grade of the first class." That it affects no municipality in the state except Toledo is admitted. But the fact is said to be immaterial, because of the classification of cities by the general assembly, and the doctrine formerly applied by the courts to such classification.

That there has long been classification of the municipalities of the state is true. It is also true that while most

[1] John A. Fairlie, *Essays in Municipal Administration*, 96–97. Copyright, 1908, by The Macmillan Company. Reprinted by permission.

[2] State *ex rel.* Knisely *et al v.* Jones *et al.*, Supreme Court of Ohio, 1902, 66 Ohio State Reports, 453.

of the acts conferring corporate powers upon separate municipalities by a classified description, instead of by name, have been passed without contest as to their validity, such classification was reluctantly held by this court to be permissible. But attention to the original classification, and to the doctrine upon which it was sustained, must lead to the conclusion that the doctrine does not sustain the classification involved in the present case, and in State *ex rel. v.* Beacom *et al.*, presently to be decided. Originally, all the municipal corporations of the state were comprehended within the following classification: "Cities of the first, and cities of the second class; incorporated villages, and incorporated villages for special purposes." The basis of the classification was unqualifiedly fixed by the statute which provided that all cities which then had, or might thereafter have, a population exceeding twenty thousand, should be cities of the first class; and, by like terms, municipalities having, or attaining to, a population of more than five thousand, but not exceeding twenty thousand, should be cities of the second class. By an unvarying rule the characteristic of population was made the basis of the classification, and it was made inevitable that every city attaining a population of twenty thousand should advance, and become a city of the first class; and that every village attaining a population of five thousand should become a city of the second class. Against the validity of acts conferring corporate powers by such classification, it was urged that the validity of an act must be determined by its practical operation, and not by its form; and that such acts, though general in form, were special in operation. The answer to that objection stated the sum of the judicial doctrine of classification. One may state that answer as strongly as his abilities will permit, without giving it his approval. The answer was that the classification was to be permanent since it was to be presumed that the general assembly intended obedience to the constitution, that the requirement of the constitution was not that an act granting corporate power should immediately operate in all cities, but that there was a sufficient compliance in the

provisions of the statute for the imperative advancement of every municipality when it should have the prescribed characteristic of population, and thus every municipality of the class described in the statute by which power was conferred, or of a lower class, might come within its operation. Two things were true and they were of the essence of the doctrine. Advancement was by a rule of unvarying application, and every municipality might become subject to the operation of every statute conferring corporate power upon its own or a higher class.

The number of classes into which successive acts have since divided the municipalities of the state to make them recipients of corporate power cannot be ascertained upon any inquiry that is practicable. Sections 1546 to 1552 of the Revised Statutes relate exclusively to the subject of classification. The first of these sections now provides that cities of the first class shall be of three grades, and cities of the second class shall be of eight grades. In the present view grades of classes are but added classes. In these eleven classes the eleven principal cities of the state are isolated, so that an act conferring corporate power upon one of them by classified description, confers it upon no other. They have been isolated under the guise of classification, as their growth promised realization of the belief which was the foundation of the judicial doctrine of classification, viz.: that their advancement under the unvarying rule of population, would give a wider operation to acts conferring corporate powers. An impediment to the more general operation of laws conferring corporate powers on cities of the first class is found in section 1546: "Cities of the second class, which hereafter become cities of the first class, shall constitute the fourth grade of the latter class." We are not aware that there is now in the state a city of the fourth grade of the first class, but the class is provided to the end that it may receive any city of the second class which may be advanced, and that such city may thus be excepted from the operation of these acts relating to Cleveland and Toledo, which are, respectively, cities of the second and third grade, of the first class. The judicial doctrine of

classification was, that all the cities having the same characteristic of a substantial equality of population, should have the same corporate power, although another class might be formed upon a substantial difference in population. The classification now provided affords no reason for the belief that it is based upon such substantial difference in population as the judicial doctrine contemplated. When the original classification, and the numerous reclassifications were made, Cincinnati was the most populous city in the state. Cleveland now exceeds it in population, but corporate powers continue to be conferred by the former description. Is it believed that a doctrine which recognized the validity of legislation applying only to the city of Cleveland because it was substantially below Cincinnati in population, requires us to hold that similar legislation is now valid because it has the larger population? Furthermore, the increasingly numerous classes of municipalities show that even when a difference in population is made to appear as the basis of classification, the differences in population are so trivial that they cannot be regarded as the real basis. We have been required, from time to time, to examine many of the acts to confer corporate powers upon the isolated cities composing the eleven classes referred to, and others containing special classifications, and still others have been examined in the present inquiry. In view of the trivial differences in population, and of the nature of the powers conferred, it appears from such examination, that the present classification cannot be regarded as based upon differences in population, or upon any other real or supposed differences in local requirements. Its real basis is found in the differing views or interests of those who promote legislation for the different municipalities of the state. An intention to do that which would be violative of the organic law should not be imputed upon mere suspicion. But the body of legislation relating to this subject shows the legislative intent to substitute isolation for classification, so that all the municipalities of the state which are large enough to attract attention shall be denied the protection intended to be afforded

by this section of the constitution. The provisions of the section could not be more clear or imperative, and relief from the present confusion of municipal acts and the burdens which they impose would not be afforded by its amendment. Since we cannot admit that legislative power is in its nature illimitable, we must conclude that this provision of the paramount law annuls the acts relating to Cleveland and Toledo, if they confer corporate power.

120. *The Present Constitution of Ohio*[1]

Sec. 1. Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

Sec. 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Sec. 8. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter." The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty days nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special elec-

[1] Article XVIII, adopted September 3, 1912.

tion to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein.

Sec. 9. Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments shall be mailed to the electors as hereinbefore provided for copies of a proposed charter. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the Secretary of State, within thirty days after adoption by a referendum vote.

Sec. 13. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local

purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books, and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

Sec. 14. All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total vote cast at the last preceding general municipal election.

CHAPTER XXXVIII

THE NEWER FORMS OF CITY GOVERNMENT

More than thirty-five years ago James Bryce described the city as "the conspicuous failure in American government." One of the chief reasons for the disgraceful condition of our municipalities was the organization of their governments in almost complete disregard of the fact that the functions of such a government are almost wholly administrative in character. The elaborate political paraphernalia of checks and balances, separation of powers, numerous elective officials, bicameral council, and complex charter restrictions, produced unlimited opportunity for dishonesty, evasion of responsibility, and general inefficiency.

Since 1900 there has been a steady improvement in municipal machinery with an even greater renovation in the civic spirit of countless urban communities. After much experimentation, certain prevailing types of city government have emerged, and they are sufficiently described in the Massachusetts Optional Charter Act which follows. It is interesting to note that in developing responsibility and administrative efficiency, certain theories once considered as indispensable if "free institutions" were to be preserved, have been very largely discarded.

121. *The Massachusetts Optional Charter Act*[1]

Section 2. Any city, except Boston, which shall adopt, in the manner hereinafter prescribed, one of the plans of government provided in this act, shall thereafter be governed by the provisions thereof; and the inhabitants of such city shall continue to be a municipal corporation under the name existing at the time of such adoption, and shall have, exercise and enjoy all of the rights, immunities, powers and privileges, and shall be subject to all the duties, liabilities and obligations provided for herein, or otherwise pertaining to or incumbent upon the said city as a municipal corporation.

Section 7. At any time not less than thirty days after the passage of this act, a petition addressed to the council or other legislative body of any city, in the form and

[1] *Massachusetts General Acts of* 1915. Chapter 267, 291–315 *passim.*

signed and certified as provided in the next section, may be filed with the city clerk, who shall present the same to the city council or other legislative body. The petition shall be signed by qualified voters of the city to a number equal at least to ten per cent of the registered voters at the state election next preceding the filing of the petition.

Section 8. The petition shall be in substantially the following form:—

To the city council (or other legislative body) of the city of. . . .

We, the undersigned, qualified voters of the city, respectfully petition your honorable body to cause to be submitted to a vote of the voters the following question: "Shall the city of . . . adopt the form of government defined as Plan (A, B, C, or D, as it is desired by petitioners), and consisting of (describe plan briefly, as government by a mayor and nine councillors elected at large, or government by a mayor and councillors elected partly at large and partly from wards or districts, or government by five commissioners, one of whom shall be the mayor, or government by a mayor and four councillors, with a city manager), according to the provisions of chapter . . . of the General Acts of the year nineteen hundred and fifteen entitled 'An Act to simplify the revision of city charters'?" . . .

Section 10. The question of the adoption of not more than one plan may be submitted at an election. . . .

Section 11. If a majority of the total number of votes cast at a regular state election for and against the adoption of one of the plans of government provided for in this act shall be in favor of its adoption, the provisions of this act, so far as applicable to the form of government under the plan adopted by the city, shall supersede the provisions of its charter and of the general and special laws relating thereto and inconsistent herewith, but not, however, until officers provided for under such plan shall have been duly elected and their terms of office shall have begun. The officers provided for under the plan so adopted shall be elected in accordance with the provisions of this act relating to such plan and in accordance

with the provisions of section fifteen of this part, and their terms of office shall begin at ten o'clock in the forenoon of the first Monday of January following their election.

Section 12. Should a majority of the votes cast be against the adoption of the plan proposed, no petition proposing the same plan shall be filed within one year thereafter; but a petition proposing the adoption of one of the other plans provided for in this act may be filed at any time thereafter, and proceedings thereon shall be had as though no prior petition under this act had been filed.

Section 13. Should any one of the plans of government provided for in this act be adopted, the plan shall continue in force for the period of at least four years after the beginning of the terms of office of the officials elected thereunder; and no petition proposing a different plan shall be filed during the period of three years and six months after such adoption.

Plan A

GOVERNMENT BY MAYOR AND CITY COUNCIL ELECTED AT LARGE

Section 1. The method of city government provided for in this part shall be known as Plan A.

Section 2. Upon the adoption of Plan A by a city in the manner prescribed by this act, such plan shall become operative as provided in Part I; and its powers of government shall be exercised as is prescribed herein and in Part I.

Section 3. There shall be a mayor, elected by and from the qualified voters of the city, who shall be the chief executive officer of the city. He shall hold office for the term of two years from the first Monday of January following his election, and until his successor is elected and qualified.

Section 4. No ballot used at any annual or special or city election shall have printed thereon any party or political designation or mark, and there shall not be ap-

pended to the name of any candidate any such party or political designation or mark, or anything showing how he was nominated or indicating his views or opinions.

Section 5. The legislative powers of the city shall be vested in a city council, which shall consist of nine persons, elected at large by and from the qualified voters of the city. One of its members shall be elected by the council annually as its president. At the first election held in a city after its adoption of Plan A, the five candidates receiving the largest number of votes shall hold office for two years, and the four receiving the next largest number of votes shall hold office for one year. Thereafter, as these terms expire, there shall be elected at each annual city election a sufficient number of members to fill the vacancies created by the expiration of said terms, each of the members so elected to serve for a term of two years.

Section 6. The mayor shall receive for his services such salary as the city council shall by ordinance determine, not exceeding five thousand dollars a year, and he shall receive no other compensation from the city. His salary shall not be increased or diminished during the term for which he is elected. The council may, by a two-thirds vote of all its members taken by call of the yeas and nays, establish a salary for its members not exceeding five hundred dollars each a year. Such salary may be reduced, but no increase therein shall be made to take effect during the year in which the increase is voted.

Section 7. All heads of departments and members of municipal boards, as their present terms of office expire, but excluding the school committee, officials appointed by the governor, and assessors where they are elected by vote of the people, shall be appointed by the mayor without confirmation by the city council.

Section 9. The mayor may remove any head of a department or member of a board by filing a written statement with the city clerk setting forth in detail the specific reasons for such removal, a copy of which shall be delivered or mailed to the person thus removed, who may make a reply in writing, which, if he desires, may be filed with the city clerk; but such reply shall not affect

the action taken unless the mayor so determines. The provisions of this section shall not apply to the school committee, nor to officials appointed by the governor, nor to assessors where they are elected by vote of the people.

Section 10. Every order, ordinance, resolution and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it he shall sign it; if he disapproves it he shall return it, with his objections in writing, to the city council, which shall enter the objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution or vote by a two-thirds vote of all the members of the city council, it shall then be in force, but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution and vote shall be in force if it is not returned by the mayor within ten days after it has been presented to him. . . .

Plan B

GOVERNMENT BY MAYOR AND COUNCIL ELECTED BY DISTRICTS AND AT LARGE

Section 1. The method of city government provided for in this part shall be known as Plan B.

Section 2. Upon the adoption of Plan B by a city in the manner prescribed by this act, such plan shall become operative as provided in Part I hereof; and its powers of government shall be exercised as is prescribed herein and in Part I.

Section 3. There shall be a mayor, elected by and from the qualified voters of the city, who shall be the chief executive officer of the city. He shall hold office for the term of two years from the first Monday in January following his election and until his successor is elected and qualified.

Section 4. The legislative powers of the city shall be vested in a city council. One of its members shall be

elected by the council annually as its president. In cities having more than seven wards, the city council shall be composed of fifteen members, of whom one shall be elected from each ward by and from the qualified voters of that ward, and the remaining members shall be elected by and from the qualified voters of the city. In cities having seven wards or less, the city council shall be composed of eleven members, of whom one shall be elected from each ward by and from the qualified voters of that ward, and the remaining members shall be elected by and from the qualified voters of the city.

At the first election held in a city after its adoption of Plan B, the councillors elected from each ward shall be elected to serve for one year, and those elected at large shall be elected to serve for two years, from the first Monday in January following their election and until their successors are elected and qualified; and at each annual city election thereafter the councillors elected to fill vacancies caused by the expiration of the terms of councillors shall be elected to serve for two years.

Section 5. All heads of departments and members of municipal boards, as their present terms of office expire, but excluding the school committee, officials appointed by the governor, and assessors where they are elected by vote of the people, shall be appointed by the mayor, subject to confirmation by the city council; but the city solicitor shall be appointed by the mayor, without confirmation by the city council.

Section 6. The mayor may, with the approval of a majority of the members of the city council, remove any head of a department or member of a board before the expiration of his term of office, except members of the school committee, officials appointed by the governor, and assessors where they are elected by vote of the people. The person so removed shall receive a copy of the reasons for his removal, and he may, if he desires, contest the same before the city council. He shall have the right to be represented by counsel at such hearing.

Section 7. The mayor shall receive for his services such salary as the city council by ordinance shall deter-

mine, not exceeding five thousand dollars a year, and he shall receive no other compensation from the city. His salary shall not be increased or diminished during the term for which he is elected.

The council may, by a two-thirds vote of all its members, taken by call of the yeas and nays, establish a salary for its members not exceeding five hundred dollars each a year. Such salary may be reduced, but no increase therein shall be made to take effect during the year in which the increase is voted.

Section 8. Every order, ordinance, resolution and vote relative to the affairs of the city, adopted or passed by the city council, shall be presented to the mayor for his approval. If he approves it he shall sign it; if he disapproves it he shall return it, with his objections in writing, to the city council, which shall enter his objections at large on its records, and again consider it. If the city council, notwithstanding such disapproval of the mayor, shall again pass such order, ordinance, resolution or vote by a two-thirds vote of all the members of the city council, it shall then be in force, but such vote shall not be taken for seven days after its return to the city council. Every such order, ordinance, resolution and vote shall be in force if it is not returned by the mayor within ten days after it has been presented to him. . . .

Plan C

COMMISSION FORM OF GOVERNMENT

Section 1. The method of city government provided for in this part shall be known as Plan C.

Section 2. The government of the city and the general management and control of all of its affairs shall be vested in a city council, which shall be elected and shall exercise its powers in the manner hereinafter set forth; except, however, that the general management and control of the the public schools of the city and of the property pertaining thereto shall be vested in the school committee.

Section 3. The city council shall consist of five members, to wit:—a mayor, who shall be the commissioner of

administration; a commissioner of finance; a commissioner of health; a commissioner of public works and a commissioner of public property. Each of these commissioners shall have charge of the department of city affairs indicated by his official title, except as to the affairs and property of the city which are within the jurisdiction of the school committee. All of these officers shall be elected at large by and from the qualified voters of the whole city for terms of two years, except as is hereinafter provided.

In case of a difference of opinion as to the departments to be in charge of any one or more of the commissioners, the matter shall be determined by vote of a majority of the commissioners.

Section 4. The terms of office of the members of the council shall commence at ten o'clock in the forenoon of the first Monday in January following their election and shall be for two years each, and until their successors are elected and qualified: *provided, however*, that the terms of office of the commissioner of administration, the commissioner of finance and the commissioner of health first so elected shall be for the term of two years, and the terms of office of the commissioner of public works and the commissioner of public property first so elected shall be for the term of one year, and thereafter the commissioners elected at each annual city election to fill the vacancies caused by the expiration of the terms of commissioners shall be elected to serve for two years.

Section 5. The city council elected as aforesaid shall meet at ten o'clock in the forenoon on the first Monday of January in each year, and the members of the city council whose terms of office then begin shall severally make oath, before the city clerk or a justice of the peace, to perform faithfully the duties of their respective offices. The city council shall thereupon be organized by the choice of a president, who shall hold his office during the pleasure of the city council. The president of the city council shall be some member thereof other than the mayor. The organization of the city council shall take place as aforesaid, notwithstanding the absence, death,

refusal to serve, or non-election of the mayor or of one or more of the four other members: *provided*, that at least three of the persons entitled to be members of the city council are present and make oath as aforesaid. Any member entitled to make the aforesaid oath, who was not present at the time fixed therefor, may make oath at any time thereafter.

Section 6. The city council shall fix suitable times for its regular meetings. The mayor, the president of the city council or any two members thereof may at any time call a special meeting by causing a written notice, stating the time of holding such meeting and signed by the person or persons calling the same, to be delivered in hand to each member, or left at his usual dwelling place, at least six hours before the time of such meeting. Meetings of the city council may also be held at any time when all the members of the council are present and consent thereto.

Section 7. A majority of the members of the city council shall constitute a quorum. Its meetings shall be public, and the mayor, if present, shall preside and shall have the right to vote. In the absence of the mayor the president of the city council shall preside, and in the absence of both, a chairman pro tempore shall be chosen. The city clerk shall be, ex officio, clerk of the city council, and shall keep records of its proceedings; but in case of his temporary absence, or in case of a vacancy in the office, the city council may elect by ballot a temporary clerk, who shall be sworn to the faithful discharge of his duties and may act as clerk of the city council until a city clerk is chosen and qualified. All final votes of the city council involving the expenditure of fifty dollars or over shall be by yeas and nays and shall be entered on the records. On the request of one member the vote shall be by yeas and nays and shall be entered upon the records. The affirmative vote of at least three members shall be necessary for the passage of any order, ordinance, resolution or vote.

Section 8. The city council shall have and exercise all the legislative powers of the city, except as such powers

are herein and in Part I reserved to the school committee and to the qualified voters of the city; and the city council and its members shall, severally or collectively, have and possess, and shall themselves or through such officers as they may elect or appoint, exercise all the other powers, rights and duties had, possessed or exercised, immediately prior to the adoption of this act, by the mayor, board of aldermen, common council, and all other boards, commissions and committees of the city and their members, severally or collectively, except such as are in Part I conferred upon the school committee or are otherwise provided for in this part.

Section 9. In legislative session, the city council shall act by ordinance, resolution, order or vote.

The yeas and nays shall be taken upon the passage of all ordinances and resolutions, and entered upon the journal of its proceedings. Upon the request of any member, the yeas and nays shall be taken and recorded upon any order or vote. Every ordinance, resolution, order or vote passed by the city council shall, except as is hereinafter provided, require on final passage the affirmative vote of a majority of the members of the city council.

All votes making appropriations of money or authorizing loans shall be in itemized form.

Section 10. The mayor shall be the chief executive officer of the city, commissioner of administration and, ex officio, chairman of the school committee. He shall preside at all meetings of the city council and of the school committee at which he is present. He shall also, when present, preside at all joint conventions of the city council and of the school committee.

He shall have the right to vote on all questions coming before the city council, but shall have no power of veto.

He shall have such other duties, rights and powers as may be provided by ordinance, not in conflict with this act.

During the absence or inability of the mayor to act, the commissioner of finance shall, as acting mayor, assume the duties and exercise all the rights and powers of the mayor: *provided,* that, in the absence or inability so

to act of the commissioner of finance, the city council may select another commissioner from their number to perform the duties of acting mayor.

Section 11. All executive and administrative powers, authorities and duties, not otherwise provided for in this act, shall be assigned to a suitable department by the city council by ordinance, and changes in the assignments made in this manner may be made by ordinance by the affirmative vote of three members of the city council, or by the qualified voters of the city upon initiative petition.

The city council shall determine the policies to be pursued and the work to be undertaken in each department, but each commissioner shall have full power to carry out the policies or to have the work performed in his department as directed by the city council.

Section 12. Each commissioner may, except as is otherwise provided herein, appoint a qualified person to serve as the head of each of the departments under his charge and may remove him at any time for cause stated in the order of removal. All appointments and removals so made shall be subject to confirmation by the city council. The employees in each department shall be appointed and removed by the head of that department. Nothing in this section shall in any way affect the laws governing the civil service.

Section 13. Each of said commissioners shall keep a record book in which shall be recorded a brief but clear and comprehensive record of all affairs of the department under his charge as soon as performed, and shall quarterly render to the city council a full report of all operations of such department, and shall annually, and oftener if required by the city council, make a synopsis thereof for publication. All such records shall be open for public inspection. The city council shall provide for the publication of such annual or other reports, and of such parts of the quarterly reports, or of such other information regarding city affairs as it may deem advisable.

Section 14. The mayor shall receive for his services such salary as the city council shall by ordinance determine, not exceeding five thousand dollars a year, and he

shall receive no other compensation from the city. His salary shall not be increased or diminished during the term for which he is elected. The council may, by a vote of not less than three members taken by call of the yeas and nays, establish a salary for its members, not exceeding four thousand dollars a year for each member. Such salary may be reduced, but no increase therein shall be made to take effect until the municipal year succeeding that in which the vote establishing the salary is passed.

Plan D

MAYOR, CITY COUNCIL AND CITY MANAGER

Section 1. The method of city government provided for in this part shall be known as Plan D.

Section 2. Upon the adoption of Plan D by a city in the manner prescribed by Part I of this act, such plan shall become operative as provided in Part I, and the powers of government of such city shall be exercised as provided herein and in Part I.

Section 3. The government of the city and the general management and control of all its affairs shall be vested in a city council, which shall be elected and shall exercise its powers in the manner herein and in Part I set forth; except that the city manager shall have the authority hereinafter specified, and that the general management and conduct of the public schools of the city and of the property pertaining thereto shall be vested in the school committee.

Section 4. The city council shall consist of five members, who shall be elected at large by and from the qualified voters of the city for a term of two years and until their successors are elected and qualified; except that at the first election the three candidates having the highest number of votes shall serve for two years and the two candidates having the next highest number of votes shall serve for one year.

Section 5. All the legislative powers of the city shall be vested in the city council. The city council elected as aforesaid shall meet at ten o'clock in the forenoon on

the first Monday of January in each year, and the members of the city council whose terms of office then begin shall severally make oath before the city clerk, or a justice of the peace, to perform faithfully the duties of their respective offices. The city council shall thereupon be organized by the choice of a president, who shall hold his office during the pleasure of the city council. The president of the city council shall be some member thereof other than the mayor. The organization of the city council shall take place as aforesaid, notwithstanding the absence, death, refusal to serve, or non-election of one or more of the members: *provided*, that at least three of the persons entitled to be members of the city council are present and make oath as aforesaid. Any member entitled to make the aforesaid oath, who was not present at the time fixed therefor, may make oath at any time thereafter.

Section 6. The city council shall fix suitable times for its regular meetings. The mayor, the president of the city council or any two members thereof may at any time call a special meeting by causing a written notice, stating the time of holding such meeting and signed by the person or persons calling the same, to be delivered in hand to each member, or left at his usual dwelling place, at least six hours before the time of such meeting. Meetings of the city council may also be held at any time when all the members of the council are present and consent thereto.

Section 7. A majority of the members of the city council shall constitute a quorum. Its meetings shall be public, and the mayor, if present, shall preside and shall have the right to vote. In the absence of the mayor the president of the city council shall preside, and in the absence of both, a chairman pro tempore shall be chosen. The city clerk shall be, ex officio, clerk of the city council, and shall keep records of its proceedings; but in case of his temporary absence, or in case of a vacancy in the office, the city council may elect by ballot a temporary clerk, who shall be sworn to the faithful discharge of his duties and may act as clerk of the city council until a

city clerk is chosen and qualified. All final votes of the city council involving the expenditure of fifty dollars or over shall be by yeas and nays and shall be entered on the records. On the request of one member the vote shall be by yeas and nays and shall be entered upon the records. The affirmative vote of at least three members shall be necessary for the passage of any order, ordinance, resolution or vote.

Section 8. Vacancies in the city council shall be filled by the council for the remainder of the unexpired term.

Section 9. The mayor shall be that member of the city council who, at the regular municipal election at which the three members of the council were elected, received the highest number of votes, except that at the first regular municipal election held in a city adopting this plan of government the mayor shall be the councillor receiving the highest number of votes. In case two councillors receive the same number of votes, one of them shall be chosen mayor by the remaining members of the council. In case of a vacancy in the office of mayor, the remaining members of the council shall choose from their own number his successor for the unexpired term. The mayor shall be the presiding officer, except that in his absence the president of the council shall preside; and in the absence of both the mayor and the president of the council, a president pro tempore may be chosen. The mayor shall be the official head of the city. He shall have no power of veto, but shall have the same power as the other members of the council to vote upon all measures coming before it.

Section 10. The mayor shall receive for his services such salary as the city council shall by ordinance determine, not exceeding two thousand dollars a year, and he shall receive no other compensation from the city. His salary shall not be increased or diminished during the term for which he is elected.

The council may by a vote of not less than three members, taken by call of the yeas and nays, establish a salary for its members, not exceeding five hundred dollars a year for each. Such salary may be reduced, but no in-

crease therein shall be made to take effect during the year in which the increase is voted.

Section 11. The city council shall appoint a city manager, who shall be the administrative head of the city government and shall be responsible for the administration of all departments. He shall be appointed with regard to merit only, and he need not be a resident of the city when appointed. He shall hold office during the pleasure of the city council and shall receive such compensation as it shall fix by ordinance.

Section 12. The city manager shall (1) be the administrative head of the city government; (2) see that within the city the laws of the state and the ordinances, resolutions and regulations of the council are faithfully executed; (3) attend all meetings of the council, and recommend for adoption such measures as he shall deem expedient; (4) make reports to the council from time to time upon the affairs of the city, keep the council fully advised of the city's financial condition and its future financial needs; (5) appoint and remove all heads of departments, superintendents and other employees of the city.

Section 13. Such city officers and employees as the council shall determine are necessary for the proper administration of the city shall be appointed by the city manager, and any such officer or employee may be removed by him; but the city manager shall report every such appointment and removal to the council at the next meeting thereof following any such appointment or removal.

Section 14. The officers and employees of the city shall perform such duties as may be required of them by the city manager, under general regulations of the city council.

PART FOUR. THE EXTENSION OF DEMOCRACY

CHAPTER XXXIX

DIRECT LEGISLATION AND THE RECALL

At the closing session of the New York Constitutional Convention of 1915, the presiding officer, Elihu Root, declared that there had been a nation-wide drift away from "that representative government which is the chief gift of our race to freedom." In many other States the people "had had recourse to an abandonment or partial abandonment of representative government. They have had recourse to the initiative and referendum and recall, the recall of officers, and the recall of decisions." The convention had directed its efforts "towards rescuing the representative government of our fathers from the obloquy which has come upon it in recent years," and had attempted to restore the legislative branch to a position of dignity and importance. Two years later Massachusetts incorporated in her revised constitution a conservative form of the initiative and referendum, but since that time, except in city charters, this movement seems to have lost its force.

The referendum has been in much longer use than the initiative and has proved useful and necessary in matters of constitutional amendment, and as a means of ascertaining the will of the electorate on such matters as creating bonded indebtedness or on other broad questions of policy. There has developed a demand that it be made an integral part of the procedure for ratifying amendments to the Federal Constitution, the claim frequently appearing that the Eighteenth and Nineteenth Amendments were ratified by several State legislatures in defiance of the fact that similar State amendments had already been rejected by popular vote. The initiative has been subject to considerable abuse, and California and Oregon especially have been obliged to vote repeatedly on single-tax laws, government-ownership projects, anti-vivisection laws and similar matters sponsored by energetic groups who found no difficulty in securing the necessary petitions placing their propositions on the ballot. The procedure commonly prescribed is illustrated in the following documents, and we have also an authoritative opinion that direct legislation is at least a "republican" institution, within the meaning of the Federal Constitution.

The recall of elective officials by popular vote is a product of the wide-spread dissatisfaction with existing governmental machinery and methods which characterized the first fifteen years of the present century. While appearing in numerous States its use has been infrequent, the most notable instance being the removal of a North Dakota governor in 1921.

122. *The Initiative and Referendum in Oregon*[1]

Art. 4, Sec. 1. The legislative authority of the State shall be vested in a legislative assembly, consisting of a Senate and House of Representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety), either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the Legislative Assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the State of Oregon." This section shall not be construed to deprive any member of the Legislative Assembly of the right to introduce any measure. The whole number of votes cast for Justice of the Supreme Court at the regular election last preceding

[1] Constitution of Oregon. Article IV, Sections 1, 1a.

the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor. (Amendment of 1902.)

Art. 4, Sec. 1a. The referendum may be demanded by the people against one or more items, sections, or parts of any act of the Legislative Assembly in the same manner in which such power may be exercised against a complete act. The filing of a referendum petition against one or more items, sections, or parts of an act shall not delay the remainder of that act from becoming operative. The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation, of every character, in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that cities and towns may provide as to their municipal legislation. Not more than ten per cent of the legal voters may be required to order the referendum nor more then fifteen per cent to propose any measure, by the initiative, in any city or town. (Amendment of 1906).

123. *The Initiative and Referendum in Oregon: the Law of* 1907[1]

Section 5. When any measure shall be filed with the Secretary of State to be referred to the people of the State, or of any county or district composed of one or more counties, either by the Legislative Assembly or by the referendum petition, and when any measure shall be proposed by initiative petition, the Secretary of State shall forthwith transmit to the Attorney-General of the

[1] *General Laws of Oregon*, 1907. Chapter 226.

State a copy thereof, and within ten days thereafter the Attorney-General shall provide and return to the Secretary of State a ballot title for said measure. The ballot title may be distinct from the legislative title of the measure, and shall express, in not exceeding one hundred words, the purpose of the measure. The ballot title shall be printed with the numbers of the measure, on the official ballot. In making such ballot title the Attorney-General shall, to the best of his ability, give a true and impartial statement of the purpose of the measure, and in such language that the ballot title shall not be intentionally an argument, or likely to create prejudice, either for or against the measure. Any person who is dissatisfied with the ballot title provided by the Attorney-General for any measure may appeal from his decision to the circuit court, as provided by section 4 of this act, by petition, praying for a different title and setting forth the reasons why the title prepared by the Attorney-General is insufficient or unfair. No appeal shall be allowed from the decision of the Attorney-General on a ballot title, unless the same is taken within ten days after said decision is filed. A copy of every such decision shall be served by the Secretary of State or the clerk of the court, upon the person offering or filing such initiative or referendum petition or appeal. Service of such decision may be by mail or telegraph, and shall be made forthwith. Said circuit court shall thereupon examine said measure, hear arguments, and in its decision thereon certify to the Secretary of State a ballot title for the measure in accord with the intent of this section. The decision of the circuit court shall be final. The Secretary of State shall print on the official ballot the title thus certified to him.

Section 6. The Secretary of State, at the time he furnishes to the county clerks of the several counties certified copies of the names of the candidates for state and district offices, shall furnish to each of said county clerks his certified copy of the ballot titles and numbers of the several measures to be voted upon at the ensuing general election, and he shall use for each measure the ballot title

designated in the manner herein provided. Such ballot title shall in no case exceed one hundred words, and shall not resemble, so far as to probably create confusion, any such title previously filed for any measure to be submitted at that election; he shall number such measures and such ballot titles shall be printed on the official ballot in the order in which the acts referred by the Legislative Assembly and petitions by the people shall be filed in his office. The affirmative of the first measure shall be numbered 300 and the negative 301 in numerals, and the succeeding measures shall be numbered consecutively 302, 303, 304, 305, and so on, at each election. It shall be the duty of the several county clerks to print said ballot titles and numbers upon the official ballot in the order presented to them by the Secretary of State and the relative position required by law. Measures referred by the Legislative Assembly shall be designated by the heading "Referred to the People by the Legislative Assembly"; measures referred by petition shall be designated "Referendum ordered by Petition of the People"; measures proposed by initiative petition shall be designated and distinguished on the ballot by the heading "Proposed by Initiative Petition."

Section 7. The manner of voting upon measures submitted to the people shall be the same as is now or may be required and provided by law; no measure shall be adopted unless it shall receive an affirmative majority of the total number of respective votes cast on such measure and entitled to be counted under the provisions of this act; that is to say, supposing seventy thousand ballots to be properly marked on any measure, it shall not be adopted unless it shall receive more than thirty-five thousand affirmative votes. If two or more conflicting laws shall be approved by the people at the same election, the law receiving the greatest number of affirmative votes shall be paramount in all particulars as to which there is a conflict, even though such law may not have received the greatest majority of affirmative votes. If two or more conflicting amendments to the constitution shall be approved by the people at the same election, the

amendment which receives the greatest number of affirmative votes shall be paramount in all particulars as to which there is conflict, even though such amendment may not have received the greatest majority of affirmative votes.

Section 8. Not later than the first Monday, of the third month next before any regular general election, nor later than thirty days before any special election, at which any proposed law, part of an act, or amendment to the constitution is to be submitted to the people, the Secretary of State shall cause to be printed in pamphlet form a true copy of the title and text of each measure to be submitted, with the number and form in which the ballot title thereof will be printed on the official ballot. The person, committee, or duly authorized officers of any organization filing any petition for the initiative, but no other person or organization, shall have the right to file with the Secretary of State for printing and distribution any argument advocating such measure; said argument shall be filed not later than the first Monday of the fourth month before the regular election at which the measure is to be voted upon. Any person, committee, or organization may file with the Secretary of State, for printing and distribution, any arguments they may desire, opposing any measure, not later than the fourth Monday of the fourth month immediately preceding such election. Arguments advocating or opposing any measures referred to the people by the Legislative Assembly, or by referendum petition, at a regular general election, shall be governed by the same rules as to time, but may be filed with the Secretary of State by any person, committee, or organization; in the case of measures submitted at a special election, all arguments in support of such measure at least sixty days before such election. But in every case the person or persons offering such arguments for printing and distribution shall pay to the Secretary of State sufficient money to pay all the expenses for paper and printing to supply one copy with every copy of the measure to be printed by the State; and he shall forthwith notify the persons offering the same of the

amount of money necessary. The Secretary of State shall cause one copy of each of said arguments to be bound in the pamphlet copy of the measures to be submitted as herein provided, and all such measures and arguments to be submitted at one election shall be bound together in a single pamphlet. All the printing shall be done by the State, and the pages of said pamphlet shall be numbered consecutively from one to the end. The pages of said pamphlet shall be six by nine inches in size, and the printed matter thereon shall be set in eight point Roman-faced type, single leaded, and twenty-five ems in width, with appropriate heads and printed on sized and super-calendered paper twenty-five by thirty-eight inches, weighing fifty pounds to the ream. The title page of each measure bound in said pamphlet shall show its ballot title and ballot numbers. The title page of each argument shall show the measure or measures it favors or opposes and by what persons or organization it is issued. When such arguments are printed he shall pay the State Printer therefor from the money deposited with him and refund the surplus, if any, to the parties who paid it to him. The cost of printing, binding, and distributing the measures proposed and of binding and distributing the arguments, shall be paid by the State as a part of the state printing, it being intended that only the cost of paper and printing the arguments shall be paid by the parties presenting the same, and they shall not be charged any higher rate for such work than is paid by the State for similar work and paper. Not later than the fifty-fifth day before the regular general election at which such measures are to be voted upon, the Secretary of State shall transmit by mail, with postage fully prepaid, to every voter in the State whose address he may have, one copy of such pamphlet; *provided*, that if the Secretary shall, at or about the same time be mailing any other pamphlet to every voter, he may, if practicable, bind the matter herein provided for in the first part of said pamphlet, numbering the pages of the entire pamphlet consecutively from one to the end, or he may inclose the pamphlets under one cover. In the case of a special elec-

tion he shall mail said pamphlet to every voter not less than twenty days before said special election. . . .

124. *Kadderly* et al. v. *City of Portland* et al.[1]

Nor do we think the amendment [of 1902] void because in conflict with section 4, art. 4, of the Constitution of the United States, guaranteeing to every state a republican form of government. The purpose of this provision of the Constitution is to protect the people of the several states against aristocratic and monarchical invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government. . . . But it does not forbid them from amending or changing their Constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the Constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.". . . And in discussing the section of the Constitution of the United States now under consideration, he says: "But the authority extends no further than to a guaranty of a republican form of government, which supposes a preëxisting government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the states, they are guaranteed by the federal Constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican constitutions.". . . Now, the initiative and referendum amendment does not abolish or destroy

[1] Supreme Court of Oregon, 1903. 44 Oregon, 114.

the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive, and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the Legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the Legislature at will. The veto power of the Governor is not abridged in any way, except as to such laws as the Legislature may refer to the people. The provision of the amendment that "the veto power of the governor shall not extend to measures referred to the people" must necessarily be confined to the measures which the Legislature may refer, and cannot apply to acts upon which the referendum may be invoked by petition. The Governor is required, under the Constitution, to exercise his veto power, if at all, within five days after the act shall have been presented to him, unless the general adjournment of the Legislature shall prevent its return within that time, in which case he shall exercise his right within five days after the adjournment. He must necessarily act, therefore, before the time expires within which a referendum by petition on any act of the Legislature may be invoked, and before it can be known whether it will be invoked or not. Unless, therefore, he has a right to veto any act submitted to him, except such as the Legislature may specially refer to the people, one of the safeguards against hasty or ill-advised legislation which is everywhere regarded as essential is removed—a result manifestly not contemplated by the amendment. . . .

125. *The Initiative and Referendum in Practice*[1]

(*On Official Ballot, Nos.* 314 *and* 315)

A MEASURE

To amend section 5259, Oregon Laws, relating to compulsory education, to be submitted to the legal electors of the state of Oregon for their approval or rejection at the regular general election to be held November 7, 1922; proposed by initiative petition filed in the office of the secretary of state of the state of Oregon July 6, 1922.

The following is the form and number in which the proposed measure will be printed on the official ballot:

Initiative Bill—Proposed by Initiative Petition

Initiated by Ira B. Sturges, Baker, Oregon; Dr. Robert C. Ellsworth, Pendleton, Oregon; Harold Baldwin, Prineville, Oregon; W. B. Daggett, Redmond, Oregon; Lewis H. Irving, Madras, Oregon; Collin E. Davis, The Dalles, Oregon; Leslie G. Johnson, Marshfield, Oregon; C. A. Swope, Grants Pass, Oregon; W. F. Harris, Roseburg, Oregon; John R. Penland, Albany, Oregon; J. R. Jeffery, Seaside, Oregon; F. C. Holibaugh, St. Helens, Oregon; O. O. Hodson, McMinnville, Oregon; E. L. Johnson, Hillsboro, Oregon —COMPULSORY EDUCATION BILL—Purpose: Requiring any parent, guardian or other person having control, charge or custody of a child over eight and under sixteen years of age, from and after September 1, 1926, to send such child to a public school

[1] Extracts from the pamphlet, *Proposed Constitutional Amendments and Measures (with Arguments) to be Submitted to the Voters of Oregon at the General Election, November* 7, 1922. Compiled by Sam A. Kozer, secretary of state. It is worth noting that the Compulsory Education Bill was adopted. Its enforcement was promptly enjoined and the measure finally declared unconstitutional by the United States Supreme Court, 1925, in Pierce *et al v.* Hill Military Academy and Pierce *et al v.* Society of the Sisters of the Holy Names of Jesus and Mary, 268 United States, 510.

during the entire school year, excepting: (a) children physically unable; (b) children who have completed the eighth grade; (c) children between the ages of eight and ten living more than one and one-half miles, and children over ten years of age living more than three miles from a public school, except when transportation is furnished; (d) children taught by parent or private teacher.

314 Yes — Vote YES or NO

315 No

[The full text of the bill and several negative arguments are omitted.]

Argument (Affirmative)

Submitted by H. Baldwin, W. B. Daggett, Collin E. Davis, W. F. Harris, O. O. Hodson, F. C. Holibaugh, J. R. Jeffery, E. L. Johnson, Leslie G. Johnson, John R. Penland, Ira B. Sturges, in behalf of the *Compulsory Education Bill.*

Do you believe in our public schools?

Do you believe they should have our full, complete and loyal support?

What is the purpose of our public schools, and why should we tax ourselves for their support?

Because they are the creators of true citizens by common education, which teaches those ideals and standards upon which our government rests.

Our nation supports the public school for the sole purpose of self-preservation.

The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.

We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.

Mix the children of the foreign born with the native

born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American.

The permanency of this nation rests in the education of its youth in our public schools, where they will be correctly instructed in the history of our country and the aims of our government, and in those fundamental principles of freedom and democracy, reverence and righteousness, where all shall stand upon one common level.

When every parent in our land has a child in our public school, then and only then will there be united interest in the growth and higher efficiency of our public schools.

Our children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, there to absorb the narrow views of life as they are taught. If they are so divided, we will find our citizenship composed and made up of cliques, cults and factions each striving, not for the good of the whole, but for the supremacy of themselves. A divided school can no more succeed than a divided nation.

The inspiration for this act is the following resolution:

"*Resolved*, That we recognize and proclaim our belief in the free and compulsory education of the children of our nation in public primary schools supported by public taxation, upon which all children shall attend and be instructed in the English language only without regard to race or creed as the only sure foundation for the perpetuation and preservation of our free institutions, guaranteed by the constitution of the United States, and we pledge the efforts of the membership of the order to promote by all lawful means the organization, extension and development to the highest degree of such schools, and to oppose the efforts of any and all who seek to limit, curtail, hinder or destroy the public school system of our land."

The above resolution was adopted by the Supreme Council, A. & A. S. Rite, for the Southern Jurisdiction of the United States, May, 1920.

Grand Lodge of Oregon, A. F. & A. M., June, 1920.

Imperial Council, A. A. O. Nobles Mystic Shrine, June, 1920.

Argument (Negative)

Submitted by W. M. Ladd, J. C. Ainsworth, C. D. Bruun, F. L. Shull, Charles H. Carey, E. C. Sammons, E. C. Shevlin, Chas. J. Gray, Wm. D. Wheelwright, Richard W. Montague, C. F. Adams, W. B. Ayer, and James B. Kerr, of Portland, Oregon, opposing the *Compulsory Education Bill.*

1. DENIAL OF RIGHT

This measure would deny to parents the right to choose the school, the teacher, the methods, by means of which their children are to be educated; a right fundamental in any country which pretends to be free.

2. PRUSSIAN SYSTEM.

This measure imitates the method of public education which brought Prussia to her deserved destruction—giving the state dictatorial powers over the training of children and destroying independence of character and freedom of thought.

3. THE METHOD OF BOLSHEVIST RUSSIA.

In present day Russia the Bolshevist government treats the child as the ward of the state. This measure proposes to adopt this method and to substitute state control for the authority and guidance of the parents and is destructive of American independence.

4. OVERCROWDING SCHOOLS AND INCREASED TAXES.

We, in Oregon, are justly proud of our school system but we have already felt the burden of taxes necessary for its support. If the number of children now attending the public schools is to be increased by adding those now taught in private schools it is inevitable that overcrowding must result, and it is also certain that taxes must be materially increased or that the present standards of instruction must be materially lowered.

5. DO WE FAVOR BLUE LAWS?

If the state can require all children to receive only the instruction prescribed by public school directors what is to prevent the state from forcing upon all its citizens a particular religious creed, from requiring all its citizens to receive treatment from state physicians or from enforcing the Puritan Sunday and a code of Blue Laws?

6. CONDITIONS DO NOT DEMAND THIS MEASURE.

Conditions in Oregon certainly do not call for any such drastic measure. The population is 85.1 per cent native white, and only 13 per cent foreign born white and three-fourths of the latter are naturalized. There is no crowded foreign section in any Oregon town.

7. TITLE OF MEASURE IS DECEPTIVE.

This is miscalled a compulsory educational measure. Compulsory education is now required under existing law. Under the present law all children must be educated up to the standard of the common schools and the supervising officers of the public schools apply the test.

We, the undersigned, are strongly in favor of public schools and of compulsory education, but we believe that the proposed measure will injure rather than aid the cause of education and that it is destructive of true Americanism.

126. *Recall from Office in Arizona*[1]

Section 1. Every public officer in the State of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a Recall Petition, demand his recall.

[1] Constitution of Arizona, Article VIII.

Section 2. Every Recall Petition must contain a general statement in not more than two hundred words, of the grounds of such demand, and must be filed in the office in which petitions for nominations to the office held by the incumbent are required to be filed. The signatures to such Recall Petition need not all be on one sheet of paper, but each signer must add to his signature the date of his signing said petition, and his place of residence, giving his street and number, if any, should he reside in a town or city. One of the signers of each sheet of such petition, or the person circulating such sheet, must make and subscribe an oath on said sheet, that the signatures thereon are genuine.

Section 3. If said officer shall offer his resignation it shall be accepted, and the vacancy shall be filled as may be provided by law. If he shall not resign within five days after a Recall Petition is filed, a special election shall be ordered to be held, not less than twenty, nor more than thirty days after such order, to determine whether such officer shall be recalled. On the ballots at said election shall be printed the reasons as set forth in the petition for demanding his recall, and in not more than two hundred words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said election shall have been officially declared.

Section 4. Unless he otherwise request, in writing, his name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at said election. The candidates who shall receive the highest number of votes, shall be declared elected for the remainder of the term. Unless the incumbent receive the highest number of votes, he shall be deemed to be removed from office, upon qualification of his successor. In the event that his successor shall not qualify within five days after the result of said election shall have been declared, the said office shall be vacant, and may be filled as provided by law.

Section 5. No Recall Petition shall be circulated against any officer until he shall have held his office for a period

of six months, except that it may be filed against a member of the Legislature at any time after five days from the beginning of the first session after his election. After one Recall Petition and election, no further Recall Petition shall be filed against the same officer during the term for which he was elected, unless petitioners signing such petition shall first pay into the public treasury which has paid such election expenses, all expenses of the preceding election.

Section 6. The general election laws shall apply to recall elections in so far as applicable. Laws necessary to facilitate the operation of the provisions of this article shall be enacted, including provision for payment by the public treasury of the reasonable special election campaign expenses of such officer.

CHAPTER XL

ELECTORAL AND PRIMARY REFORM

"Party association and organization," says James Bryce, "are to the organs of government almost what the motor nerves are to the muscles, sinews, and bones of the human body. They transmit the motive power, they determine the directions in which the organs act." Applying this simile, it may be said that for many years following the Civil War, the motor nervous system of American government underwent a process of degeneration resulting in some instances in an almost complete paralysis of function. Intimidation of voters, stuffing of ballot boxes, violence, fraud in conventions and caucuses, and miscellaneous abuses flourished. Reform and regulation of party machinery were as greatly needed as improvement in governmental processes. Some legal remedies which have been used with more or less beneficial results are discussed in the following. The early belief that party organizations are mere private associations of citizens immune from public regulation has practically disappeared. In most American communities the nomination of candidates and the procedure by which it is brought about are as important as the election process itself. In States where one political party is dominant it is more important. The frequency of elections, the large number of offices filled by popular vote, the elaborate organization of the parties, all make public control imperative.

127. *Introduction of the Australian Ballot in Massachusetts*[1]

Be it enacted, etc., as follows:

Section 1. All ballots cast in elections for national, state, district, and county officers in cities and towns after the first day of November in the year eighteen hundred and eighty-nine, and all ballots cast in municipal elections in cities after that date, shall be printed and distributed at public expense, as hereinafter provided. . . .

Section 3. Any convention of delegates representing a political party which, at the election next preceding, polled at least three per cent of the entire vote cast in

[1] *Massachusetts Acts and Resolves*, June 5, 1889. Chapter 413, 1110–1123 *passim*.

the state, or in the electoral district or division thereof for which the nomination is made, or any convention of delegates who have been elected in caucuses called and held in accordance with a special statute providing therefor, and any caucus so called and held in any such electoral district or division, may for the state or for the district or division for which the convention or caucus is held, as the case may be, by causing a certificate of nomination to be duly filed, make one such nomination for each office therein to be filled at the election. Every such certificate of nomination shall state such facts as may be required as above for its acceptance, and as are required in section five of this act; shall be signed by the presiding officer and by the secretary of the convention or caucus, who shall add thereto their places of residence; and shall be sworn by them to be true to the best of their knowledge and belief, and a certificate of the oath shall be annexed to the certificate of nomination.

Sect. 4. Nominations of candidates for any offices to be filled by the voters of the state at large may be made by nomination papers signed in the aggregate for each candidate by not less than one thousand qualified voters of the state. Nominations of candidates for electoral districts or divisions of the state may be made by nomination papers signed in the aggregate for each candidate by qualified voters of such district or division, not less in number than one for every one hundred persons who voted at the next preceding annual election in such district or division, but in no case less than fifty. In the case of a first election to be held in a town or ward newly established, the number of fifty shall be sufficient for the nomination of a candidate who is to be voted for only in such town or ward; and in the case of a first election in a district or division newly established, other than a town or ward, the number of fifty shall be so sufficient. Each voter signing a nomination paper shall add to his signature his place of residence, with the street and number thereof, if any, and each voter may subscribe to one nomination for each office to be filled, and no more. Women qualified to vote for members of the school committee may sign

nomination papers for candidates for the school committee. The nomination papers shall, before being filed, be respectively submitted to the registrars of voters of the cities or towns in which the signers purport to be qualified voters, and each registrar to whom the same is submitted shall forthwith certify thereon what number of the signatures are names of qualified voters, both in the city or town for which he is a registrar, and in the district or division for which the nomination is made; one of the signers to each such separate paper shall swear that the statements therein are true, to the best of his knowledge and belief, and the certificate of such oath shall be annexed; and he shall also add his post-office address.

Sect. 21. The officers in each city or town whose duty it is to designate and appoint polling-places therein shall cause the same to be suitably provided with a sufficient number of voting shelves or compartments, at or in which voters may conveniently mark their ballots, so that in the marking thereof they may be screened from the observation of others; and a guard rail shall be so constructed and placed that only such persons as are inside said rail can approach within six feet of the ballot-boxes and of such voting shelves or compartments. The arrangement shall be such that neither the ballot-boxes nor the voting shelves or compartments shall be hidden from view of those just outside the said guard-rail. The number of such voting shelves or compartments shall not be less than one for every seventy-five voters qualified to vote at such polling-place, and not less than three in any town or precinct thereof, and not less than five in any voting precinct of a city. No persons other than the election officers and voters admitted as hereinafter provided shall be permitted within said rail, except by authority of the election officers for the purpose of keeping order and enforcing the law. Each voting shelf or compartment shall be kept provided with proper supplies and conveniences for marking the ballots.

Sect. 22. Any person desiring to vote shall give his name, and if requested so to do, his residence, to one of the ballot clerks, who shall thereupon announce the

same in a loud and distinct tone of voice, clear and audible, and if such name is found upon the check-list by the ballot officer having charge thereof, he shall likewise repeat the said name, and the voter shall be allowed to enter the space enclosed by the guard rail as above provided. The ballot clerk shall give him one, and only one, ballot, and his name shall be immediately checked on said list. If the voter is a woman, she shall receive a special ballot containing the names of candidates for school committee only. Besides the election officers, not more than four voters in excess of the number of voting shelves or compartments provided shall be allowed in said enclosed space at one time.

Sect. 23. On receipt of his ballot the voter shall forthwith, and without leaving the enclosed space, retire alone to one of the voting shelves or compartments so provided, and shall prepare his ballot by marking on the appropriate margin or place, a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided therefor, and marking a cross (X) opposite thereto; and, in case of a question submitted to the vote of the people, by marking in the appropriate margin or place, a cross (X) against the answer which he desires to give. Before leaving the voting shelf or compartment the voter shall fold his ballot, without displaying the marks thereon, in the same way it was folded when received by him, and he shall keep the same so folded until he has voted. He shall vote in the manner now provided by law before leaving the enclosed space, and shall deposit his ballot in the box with the official indorsement uppermost. He shall mark and deposit his ballot without undue delay and shall quit said enclosed space as soon as he has voted. No such voter shall be allowed to occupy a voting shelf or compartment already occupied by another, nor to remain within said enclosed space more than ten minutes, nor to occupy a voting shelf or compartment for more than five minutes in case all of such shelves or compartments are in use, and other voters are waiting to occupy the same. No voter not an

election officer whose name has been checked on the list of the ballot officers, shall be allowed to re-enter said enclosed space during said election. It shall be the duty of the presiding election officer for the time being to secure the observance of the provisions of this section and of other sections relative to the duties of election officers.

Sect. 24. No person shall take or remove any ballot from the polling-place before the close of the polls. If any voter spoils a ballot he may successively obtain others one at a time, not exceeding three in all, upon returning each spoiled one. The ballots thus returned shall be immediately cancelled, and together with those not distributed to the voters, shall be preserved and with the check-list used by the ballot clerks, which shall be certified by them to be such, shall be secured in an envelope, sealed, and sent to the several city and town clerks, as required by law in the case of the ballots cast, and the other check-list used.

Sect. 25. Any voter who declares to the presiding election officer that he was a voter prior to the first day of May in the year eighteen hundred and fifty-seven, and cannot read, or that by blindness or other physical disability he is unable to mark his ballot, shall, upon request, receive the assistance of one or two of the election officers in the marking thereof; and such officer or officers shall certify on the outside thereof that it was so marked with his or their assistance, and shall thereafter give no information regarding the same. The presiding officer may in his discretion require such declaration of disability to be made by the voter under oath before him, and he is hereby qualified to administer the same.

128. *The Regulation of Primary Elections*[1]

The motive that led to the adoption of the Australian ballot law was, in general, the desire to prevent bribery, intimidation, and fraud in the conduct of elections. Bribery and intimidation, it was believed, would be made

[1] C. E. Merriam, *Primary Elections*, 28–31; 133–135. Reprinted by permission of The University of Chicago Press.

difficult by the enforced secrecy of the ballot, while the possibilities of fraud would be minimized by the legal safeguards thrown around the election process. The effect of such regulations, it was hoped, would be the reduction of the power of the boss and the facilitation of reform movements. Thus the Australian ballot reform had much in common with primary election reform.

Not only was this true, but the adoption of the new system involved legal consequences of a far-reaching character. The Australian ballot law recognized the political party, and gave it legal standing. Since the government was to print all ballots, there must be a method of determining what names were to appear upon the ballot, and under what party designation; in short a legal definition of a party. Therefore the law provided that nominations for office might be certified by party officers to the proper legal officers, and then be printed as the officially recognized party list of candidates. In order that the ballot might not be cumbered with lists of names presented by relatively unimportant groups of voters, provision was made that such nominations might be made only by parties polling a certain percentage of the total vote, as, for example, 2 per cent. at the last general election. In this way certain political parties and in nearly all cases, only the two leading parties, the Republican and the Democratic, were given what amounted to legal recognition. The leading political parties, generally against the will of the party chieftains, thus obtained a certain legal status.

When the party was given a legal standing, the way was opened toward regulation of the entire nominating process. The public became familiar with the idea of legislative control of affairs of what had generally been regarded as a voluntary association, and was less reluctant to undertake the labor. Furthermore, a legal way was provided by which the party might be made more readily amenable to regulation. Parties of a certain size, which had been given a privileged position for their nominees upon the ballot were, in return for this privilege, subjected to special restrictions. It was an easy step

from permitting the two great parties to have their candidates placed upon the ballot, when certified by the party officials, to requiring that these nominations should have been made only in accordance with such rules and regulations as might be deemed necessary—in short to prescribing in detail regulations governing the entire procedure of party primaries. The party ceased to be a purely voluntary association; and became a recognized part of the nominating machinery.

Primary reform therefore advanced at a rapid rate, and spread over the whole country, with the exception of the South, where party rules carried out the same programme. The most striking features of this movement will now briefly be passed in review.

It may be observed, in the first place, that the tendency toward optional laws, which had marked the beginning of the movement and its early stages, during this period began to wane. A number of states enacted laws of the optional class, but the period of offering party organizations the opportunity for reform was quickly coming to a close. . . .

In surveying the field of primary legislation, certain broad tendencies are evident. The most obvious feature of the whole movement is the gradual regulation by law of the affairs of what was originally regarded as a purely voluntary association. Step by step the advance has been made until the party is now completely encompassed by legal restriction. From the optional statutes, first respectfully tendered the party, the legislatures advanced to the passage of mandatory and compulsory acts, when requested by special localities. From local laws of this type the legislatures went on to cover entire states with a network of regulations, which now completely envelops the party. Beginning by forbidding a few of the more obvious and flagrant offenses against the orderly conduct of the primaries, the process continued until the application of all the laws governing regular elections was finally reached. The New York and California laws of 1866, compared with the New York law of 1898 and the California law of 1897, illustrate clearly the progress

of the regulating movement. The necessity of additional safeguards was demonstrated in one case after another, until finally the caucus was transformed literally into a primary election. In the southern states generally, however, and in some of the northern states, this process is not yet completed. The southern system still permits party control and management of the party elections within certain limits fixed by the law.

But the primary movement did not stop with legal regulation of the party election. The next stage in the development was the substitution of the direct for the indirect method of nomination—the abolition of the convention system of selecting candidates and the substitution of direct popular choice. Originally the convention system had been regarded as a triumph of the democracy over the privileged few; it had signified the triumph of responsible representation over irresponsible and self-constituted leaders. Now, however, the convention was looked upon as the tool of selfish interests, largely unrepresentative of the rank and file of the party, and only imperfectly responsive to the popular will.

So swift was the advance of public opinion that even before the process of regulating delegate primaries was completed, the abolition of the convention system was demanded. The general confusion of the evils properly attributable only to the unregulated convention plan with those inherent even in the regulated system, tended to heighten the clamor against the delegate scheme, and hastened the advent of the direct primary.

129. *Nominating Methods*[1]

Where the system of nomination by direct primary election is operative most, if not all, of the candidates who have hitherto been named by the party voters *indirectly* through delegate conventions are now nominated *directly* at the primaries. Hence the name *direct* primary. The direct primary, however, is something more than an

[1] P. O. Ray, *An Introduction to Political Parties* (edition of 1917), 140–147 *passim*. Reprinted by permission of Charles Scribner's Sons, New York City.

ordinary caucus or primary. It is usually conducted by the regular election officials, at the place where the regular elections are held, and is accompanied by all the formalities and safeguards which surround a regular election. Hence the expression, direct primary *election.*

The operation of the direct primary election method is in brief as follows: A person who desires to become the candidate of his party for an office is required to secure a certain number of signatures to a petition, the number increasing with the importance of the office sought. This petition is filed with the proper official a certain number of days before the date of the primary election, and it entitles the person named therein to have his name printed on the official ballot to be used at the primary election. On the day of the primary election, the voter goes to the polling-place and receives an official ballot of his party and then passes in review the several aspirants for nomination whose names appear on the ballot. The voter indicates on the ballot those persons whom he wishes to stand as the candidates of his party. In case he is not suited with those whose names are printed on the ballot, he may be allowed to write in the name of some other person whom he prefers for a given office. The ballots are finally counted as in an ordinary election, and those persons receiving the highest vote of their respective parties are officially declared to be the party's nominees, and their names appear on the official ballot used at the regular election which follows.

There are two kinds of direct primaries, the "closed" primary and the "open" primary. In closed primaries participation is limited by law to the members of the party who have been previously enrolled or who have complied with some sort of test of party allegiance. In the open primary a voter may vote for the candidates for nomination of any party, and no attempt is made to prevent Democrats from taking a hand in Republican nominations and *vice versa.* The best example of the open primary is to be found in the State of Wisconsin. Each voter in the Wisconsin primary is given ballots of all the parties printed on separate sheets but fastened

together and folded. He marks the ballot of the party with which he wishes to participate and deposits it in the regular ballot-box, at the same time placing the unused ballots in "the blank ballot-box."

With a few exceptions, the direct primary systems in operation in the different States, although differing greatly in details, have the following points in common:

(1) The primaries of the different parties are held on the same day and at the same place.

(2) Some form of the Australian secret ballot is used.

(3) Usually the ballots are of uniform size, shape, and color and are printed at public expense.

(4) All names printed on the official ballot appear there as the result of filing nomination petitions a certain number of days before the day of the primary election, and are usually printed in alphabetical order.

(5) The regular election officials preside and are paid out of the public funds.

(6) The polls are open a specified number of hours, as at a regular election.

(7) Nominations are generally made by plurality vote, although in some States a certain percentage of the total party vote is required. In a few States the voters indicate their first and second choices on the ballot, and a majority vote is required for nomination.

(8) The statutes against corrupt practices at elections are extended to cover these primary elections.

(9) The more recent laws generally provide for the choice of party officers—that is, the members of the different party committees—at the time when other nominations are made, and on the same ballot. . . .

(10) Most direct primary election systems attempt to prescribe some test of party membership in order to prevent the members of one party interfering with the nominations of an opposing party. This problem of the party test is one of the most serious questions which has arisen in connection with the direct primary system of nominations, and no general or wholly satisfactory solution has yet been reached. It is difficult to prescribe conditions of party allegiance without at once preventing that in-

dependence in voting which is the hope of decent politics.

The experiments along this line may be grouped into three classes:

Where personal registration is a prerequisite to voting, the voter on registering is given an opportunity (which he is usually permitted to decline) of declaring his party affiliation. From the record of such declarations a list of party voters is made up, and this serves as the voting list for the ensuing primary election. Such a system exists at present in New York. The voter is there required to fill out a blank stating the party with which he intended to participate. At the same time he subscribes to the following declaration: "I am in general sympathy with the principles of the party which I have designated by mark hereunder; it is my intention to support generally at the next election, State or national, the nominees of such party for State and national offices; and I have not enrolled with or participated in any primary election, or convention of any other party since the first day of last January."

In other States, the voter at the direct primary election asks for and receives the ballot of the party in whose nominations he wishes to take part. If challenged, he takes a oath to the effect that he is a member of that party, that he supported it at the last election, or intends to vote for at least a majority of that party's candidates at the coming election. Frequently an official party list is made up from such requests and declarations under oath.

A third method, prevailing in the Southern States, is one by which the imposition of any test of party allegiance is left to the respective party officials operating under organization rules.

The movement to substitute the direct primary for the delegate convention has spread rapidly in the last decade, until at the present time (1917) forty-three States employ the direct primary method in varying degrees. . . .

CHAPTER XLI

WOMAN SUFFRAGE

The social and economic developments of the nineteenth century greatly enlarged the opportunities of women. Their appearance in vast numbers in commerce and industry was one of the striking phenomena of the age. Legal disabilities inherited from an earlier day were gradually removed and educational and professional opportunities equalized. There was a certain inconsistency in allowing women equality of opportunity in so many fields, while denying equal suffrage. The number of States permitting women to vote grew rapidly and in 1919 the Nineteenth Amendment forbade any State to deny suffrage on account of sex. Their enfranchisement has, as yet, produced no striking results and statistics show that great numbers fail to avail themselves of the privilege of the ballot. Women have appeared in legislative bodies and have held numerous elective offices. In a majority of States, all "citizens" of proper age and character are eligible for public office, but in some the word "male" is still an additional qualification. Disabilities have not been completely removed in various technical matters of law. As a result there has been some agitation for an amendment to the Federal Constitution containing a sweeping guarantee of "equal rights." An interesting question would arise as to the status of numerous laws which the States have enacted under their police power for the special protection of women, should such a Federal guarantee ever be embodied in the Constitution.

130. *Address before the Committee of Suffrage of the New York Constitutional Convention of* 1894 *by Mary Putnam-Jacobi*[1]

. . . Since 1846, when was framed the Constitution under which this State has since lived, immense changes have been effected in the industrial, legal, and educational status of women. The tremendous influence of untrammelled liberty of thought, in America, has brought about, not only an unrivalled degree of liberty for men, but a degree of personal liberty for women hitherto unparalleled. The tremendous activity of industrial expansion, has

[1] Mary Putnam-Jacobi, *Common Sense Applied to Woman Suffrage*, 200–211 *passim*. Reprinted by permission of Henry Holt and Company, New York City.

drawn women into the vortex of industrial life, so that they have become important and recognized factors in the wealth of the State.

In 1840, only half a dozen forms of employment other than household labor were open to women. In 1884, they were found employed in three hundred and fifty-four subdivisions of industries catalogued in the census. In 1892, it has been shown that there are few lines of remunerative employment not open to women. The United States Census of 1880 showed more than two and a half million women engaged in gainful employments. And of these over 360,000 were so engaged in the State of New York.

We believe that a proper study of the facts of history shows that women have never been—as is sometimes asserted—a dependent class; that even when confined to household labors, their work has been of a character and importance so as to justly demand recognition by the State, as that of work carried on in the wholesale factories. In the great department of agricultural employments, that constitutes an entire fourth of all the industries enumerated in the census, the wives of the farmers bear a full share of the work of the farm, even though their work is not catalogued among the gainful occupations. Even when the men who furnish the raw material for their industry are the men of their own family—their fathers, husbands, or brothers,—the women who prepare the food, who make the clothing, and who keep in order the habitation of the men of the State, should be justly reckoned among its productive laborers, and not, as is commonly the case, assumed to be idlers, dependent on the bounty of relatives. When, however, the women, from choice or necessity, cross the threshold of their homes, and engage in distinctly non-domestic employments, no further illusion is possible as to their position. They have entered the ranks of industrial producers, have become independent contributors towards the wealth of the community, and are so recognized in the census. From this moment their distinct recognition as individuals by the State, as units in its body politic, entitled to an

equal place with all other units discharging the same or equivalent functions, becomes an imperative necessity, a demand to be formulated alike by expediency, by justice, and by common sense. In a republican industrial community, those to whom such equal recognition is refused, fall out of the ranks of citizens, or never enter them. Whatever may be the personal privileges of their lot, whatever the legal protection accorded to their earnings, the public status of such a class remains strictly that of aliens. At the present moment this vast and constantly growing army of women industrials constitutes an alien class. The privation for this class of political right to defend its interests is only masked, but not compensated by its numerous inter-relations with those who have rights. The menace offered to the harmonious equilibrium of the State, by the presence in it of this alien class, is concealed by the peculiar physical weakness of members, which renders them incapable of physical violence. But a menace may lie in a poison or a narcotic, as well as in a blow. Where—as in a democratic society is the case—it is necessary for every one to be alert, vigilant, intensely awake, the apathy of aliens, the indifference of aliens, the inability of aliens to unite for the common-good, is as dangerous as a dead-weight clogging the wheels of delicate machinery. Women industrials contribute to the wealth of the State, yet often, through their relative helplessness, embarrass the progress of their fellow-producers. Conscious of their individual weakness, and ignorant of their strength in combination, they are constantly liable to weaken the strength of combinations made by those stronger than themselves. Weakness kills force, for force can suffer and die, but weakness desires to live. Innocent Delilahs, the working women are often employed by the Philistines to undermine the strength of the Labor Samson. As perpetual minors, they should be entitled to protection from the State. But the State is no foster-mother; it only protects those who can protect themselves; and its last stretch of courtesy is reached when it has put every one in a position to energetically demand and secure their own protection.

It is not as industrials alone that women to-day occupy important relations to the wealth of the State. They are large holders of property, acquired either through their own exertions, through gift, through marital right, or by inheritance. It is estimated that throughout the State women hold property in their own name to the amount of at least five hundred millions of dollars. In the little city of Rochester alone they pay taxes on twenty-nine millions; in the city of Brooklyn on a hundred and three million,—or twenty-two per cent. of all the taxable property of the city.

On this immense property women pay taxes, and yet remain unrepresented in the legislatures that apportion the taxation. It is not necessary to remind this Convention that from the beginning of history the question of taxation has constituted a continually recurring grievance. The equitable adjustment of taxation is one of the surest indications that a government is just and a people prosperous. The insistent demand of Anglo-Saxon people on both sides of the Atlantic, that no government shall tax a people, but that the people alone, through their representatives, shall tax themselves, has been a chief influence in securing for these peoples freedom, limitless expansion, and power. The only reason that it has been deemed just to tax women without representation is that, until very recently, women—that is at least those holding the normal position of their sex in marriage—have not really possessed their own property; they have not been, in the eye of the law, persons.

Two years after the session of the Constitutional Convention in 1846, the Legislature of the State of New York, urged by the representations of Mrs. Stanton and other women working for suffrage, did for women in regard to the law the very thing we now pray this Convention to secure the means of doing in regard to political status—it made married women persons. The women, whose personality up to that precise date had been, in the language of the Common Law, "merged in that of their husbands," were then disengaged as distinct individuals. By a series of enactments extending from 1848 to 1862, a

married woman became entitled to hold her property instead of being held by it: to administer it, to bequeath it by will, contract for it, to sue and be sued—in her own name,—to assume, in fact, all the responsibilities towards herself, her inheritance, her earnings, and finally her children, which belonged to a woman who had no husband to represent her, or to a man entitled, in law and in politics, to represent himself. . . .

The industrial work of women, the possession of inherited wealth, the legal emancipation, and enforced assumption of responsibility, would all have been inadequate without correlative improvement in the education of women. So rapid has been this improvement, so generally is now accepted the claim of women to the highest education, that it is often forgotten in how recent times women were refused access to even the lowest. Less than a hundred years ago, in this State and in New England, girls were excluded from even the elementary public schools; or, when admitted, untaught even in arithmetic; or, when this began to be conceded, allowed to learn addition, but forbidden to proceed to the three other rules. Not until 1821 was a high school open for women, and that was at Troy, New York. . . .

In perfectly natural sequence to all these manifestations of professional and social activity on the part of women, and as a possibly unconscious recognition of the value of this activity for the welfare of the State, the Legislature in 1888 threw open to women the profession of law. . . .

It was impossible, in face of the immense evolution of the status of women, personal, industrial, legal, educational, and social, not to suggest their practical participation in one affair which so immediately concerns women, namely, the schooling of children. In New York City alone are over three thousand female teachers. It seemed impossible to hold longer to the doctrine that where so many women had been deemed capable of the expert work involved in teaching, none should be qualified, none should have the right to a voice in the selection of the officers who were to superintend the teaching. Yet this

contradiction, deemed impossible by the universal common sense of the community, has been pronounced entrenched in all the authority of the law by the Supreme Court. And it is very well that it should be so. The contradiction which pronounced unfit to vote, the women who have been solemnly ordained fit to teach, is hardly more flagrant than that now embodied in the laws of twelve States of the Union, which declares that women may elect officers to the school board, but may not exercise any other right of suffrage. . .

Until, practically, to-day the inequalities of political rights have been along lines of social class distinction. The well-born, the powerful, the educated, the rich, have ruled. The poor, the ignorant, the helpless have submitted. Macaulay declares that the upper and middle orders are the natural representatives of the human race. Whether advisably or not, it is they who have been the representatives. Thus it has happened, that women, though unenfranchised, and submitted to the personal sovereignty of the men of their own families and own class, have enjoyed superiority to and even actual supremacy over thousands of men in lower classes. But to-day, for the first time, classes have been indistinguishably fused; all previous lines of cleavage have been consolidated into one great line of demarcation, which makes a political class out of a sex. For the first time, all political right, privilege, and power repose undisguisedly on the one brutal fact of sex, unsupported, untempered, unalloyed by any attribute of education, any justification of intelligence, any glamour of wealth, any prestige of birth, any insignia of actual power. For the first time, all women, no matter how well born, how well educated, how intelligent, how rich, how serviceable to the State, have been rendered the political inferiors of men, no matter how base-born, how poverty-stricken, how ignorant, how vicious, how brutal. The pauper in the almshouse may vote, the lady who devotes herself to getting that almshouse made habitable may not. The tramp who begs cold victuals in the kitchen may vote; the heiress who feeds him, and endows a university may not. Communi-

ties are agitated and Legislatures convulsed to devise means to secure the right of suffrage to the illiterate voter. And the writers, journalists, physicians, teachers, the wives and daughters and the companions of the best educated men in the State, are left in silence; blotted out, swamped, obliterated behind this cloud of often besotted ignorance. To-day, the immigrants pouring in through the open gates of our seaport towns—the Indian when settled in severalty, the negro hardly emancipated from the degradation of two hundred years of slavery,—may all share in the Sovereignty of the State. The white woman—the American woman,—the woman in whose veins runs the blood of those heroic colonists who founded our country, of those women who helped to sustain the courage of their husbands in the Revolutionary War; the woman who may have given the flower of her youth and health in the service of our Civil War—this woman is excluded. To-day women constitute the only class of sane people excluded from the franchise, the only class deprived of political representation, except the tribal Indians and the Chinese. . . .

131. *Speech by Elihu Root before the New York Constitutional Convention*[1]

I am opposed to the granting of suffrage to women, because I believe that it would be a loss to women, to all women and to every woman; and because I believe it would be an injury to the State, and to every man and every woman in the State. It would be useless to argue this if the right of suffrage were a natural right. If it were a natural right, then women should have it though the heavens fall. But if there be any one thing settled in the long discussion of this subject, it is that suffrage is not a natural right, but is simply a means of government; and the sole question to be discussed is whether government by the suffrage of men and women will be better government than by the suffrage of men alone.

[1] August 15, 1894. *Revised Record of Constitutional Convention of* 1894, II, 521–524.

The question is, therefore, a question of expediency, and the question of expediency upon this subject is not a question of tyranny, as the gentleman from Cattaraugus has said, but a question of liberty, a question of the preservation of free constitutional government, of law, order, peace and prosperity. . . . It is not that woman is inferior to man, but it is that woman is different from man; that in the distribution of powers, of capacities, of qualities, our Maker has created man adapted to the performance of certain functions in the economy of nature and society, and women adapted to the performance of other functions. One question to be determined in the discussion of this subject is whether the nature of woman is such that her taking upon her the performance of the functions implied in suffrage will leave her in the possession and the exercise of her highest powers or will be an abandonment of those powers and an entering upon a field in which, because of her differences from man, she is distinctly inferior. Mr. President, I have said that I thought suffrage would be a loss for women. I think so because suffrage implies not merely the casting of the ballot, the gentle and peaceful fall of the snow-flake, but suffrage, if it means anything, means entering upon the field of political life, and politics is modified war. In politics there is struggle, strife, contention, bitterness, heart-burning, excitement, agitation, everything which is adverse to the true character of woman. Woman rules to-day by the sweet and noble influences of her character. Put woman into the arena of conflict and she abandons these great weapons which control the world, and she takes into her hands, feeble and nerveless for strife, weapons with which she is unfamiliar and which she is unable to wield. . . . In my judgment, sir, this whole movement arises from a false conception of the duty and of the right of men and women both. . . . It is a great mistake, sir, it is a fatal mistake that these excellent women make when they conceive that the functions of men are superior to theirs and seek to usurp them. The true government is in the family. The true throne is in the household. The highest exercise of power is that

which forms the conscience, influences the will, controls the impulses of men, and there to-day woman is supreme and woman rules the world. . . .

132. *Amendment XIX* [1]

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

2. Congress shall have power, by appropriate legislation, to enforce the provisions of this article.

[1] This amendment became effective, August 26, 1920. *United States Statutes at Large*, XLI, 1823.

PART FIVE. THE GOVERNMENT OF DEPENDENCIES

CHAPTER XLII

THE CONSTITUTION AND INSULAR TERRITORIES

The acquisition of Florida, Louisiana, Texas, and other territory, and the problem of controlling the settlers on the Western frontiers had given the United States Government some experience in problems closely resembling those of colonial administration. The acquisitions of 1898, however, offered far more serious difficulties. The inhabitants were unfamiliar with constitutional government. They were of very different racial stock and cultural background from the people who had established self-governing communities all the way across the continent. It was apparent that if "the constitution followed the flag" the probable result would be a condition of anarchy. Populations, entirely lacking in experience in self-government, suddenly equipped with the complicated machinery and elaborate guarantees of our constitutional system would not be able to meet the responsibility.

In two cases involving the collection of duties, the Supreme Court held (1901) that neither Porto Rico nor the Philippines in view of the treaty of cession, could be considered foreign territory. In the case of Downes *v.* Bidwell, decided in the same year, the court made certain rulings under which the United States has developed a distinct colonial policy. According to the opinion of the majority, there may be territories subject to the jurisdiction of the United States, and yet not incorporated into it. The Constitution is not applicable in its entirety to all areas over which the sovereignty of the United States extends. Congress under the Constitution is prohibited from the exercise of certain legislative powers under all conditions, but on the other hand, certain prohibitions are effective only for the United States, and do not apply to other territory "subject to the jurisdiction thereof." Under this principle Congress was enabled to pass legislation for the government of backward communities and peoples "half devil and half child," where a measure of paternalism is necessary. The most striking feature of this decision, however, is the principle that Congress, for purposes of territorial administration, is not bound by all the limitations of the Constitution. The anti-Imperialists seized on this, and declared it an entering wedge which might eventually disrupt our free institutions. In this connection, the dissenting opinions deserve careful study.

133. *Downes* v. *Bidwell* [1]

Mr. Justice Brown announced the conclusion and judgment of the court.

In the case of De Lima *v.* Bidwell just decided, we held that, upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the *United States* within that provision of the Constitution which declares that "all duties, imposts and excises shall be uniform throughout the United States." Art. 1, Sec. 8. If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by section 9 "vessels bound to or from one State" cannot "be obliged to enter, clear or pay duties in another."

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this court. . . .

It can nowhere be inferred [from the Constitution] that the territories were considered a part of the United States. The Constitution was created by the people of the *United States*, as a union of *States*, to be governed solely by representatives of the *States*; and even the provision relied upon here, that all duties, imposts, and excises shall be uniform "throughout the United States," is explained by subsequent provisions of the Constitution, that "no tax or duty shall be laid on articles exported from any *State*," and "no preference shall be given by any regulation of commerce or revenue to the ports of one *State* over those of another; nor shall vessels bound

[1] Supreme Court of the United States, 1901. 182 United States, 244.

to or from one *State* be obliged to enter, clear, or pay duties in another." In short, the Constitution deals with *States*, their people, and their representatives.

The Thirteenth Amendment to the Constitution, prohibiting slavery and involuntary servitude "within the United States, or in any place subject to their jurisdiction," is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded States, under a possible interpretation that those States were no longer a part of the Union, is to confess the very point in issue, since it involves an admission that, if these States were not a part of the Union, they were still subject to the jurisdiction of the United States.

Upon the other hand, the Fourteenth Amendment, upon the subject of citizenship, declares only that "all persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States, and of the *State* wherein they reside." Here there is a limitation to persons born or naturalized in the United States which is not extended to persons born in any place "subject to their jurisdiction." . . .

To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only "throughout the United States" or among the several States.

Thus, when the Constitution declares that "no bill of attainder or *ex post facto* law shall be passed," and that "no title of nobility shall be granted by the United States," it goes to the competency of Congress to pass a bill *of that description*. Perhaps the same remark may apply to the First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free-

dom of speech, or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances." We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.

Upon the other hand, when the Constitution declares that all duties shall be uniform "throughout the United States," it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the "United States," by which term we understand the *States* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them. . . .

In determining the words of Art. 1, sec. 8, "uniform throughout the United States," we are bound to consider, not only the provisions forbidding preference being given to the ports of one State over those of another (to which attention has already been called), but the other clauses declaring that no tax or duty shall be laid on articles exported from any State, and that no State shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the States which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some States and not equally upon others. . . . Thus construed together, the purpose is irresistible that the words "throughout the United States" are indistinguishable from the words "among or between the several States," and that these prohibitions were intended to apply only to commerce between ports of the several States as they then existed or should thereafter be admitted to the Union.

Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct. . . .

Whatever may be finally decided by the American

people as to the status of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments—it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. . . .

In passing upon the question involved in this case and kindred cases, we ought not to overlook the fact that, while the Constitution was intended to establish a permanent form of government for the States which should elect to take advantage of its conditions, and continue for an indefinite future, the vast possibilities of that future could never have entered the minds of its framers. . . .

Had the acquisition of other territories been contemplated as a possibility, could it have been foreseen that, within little more than one hundred years, we were destined to acquire, not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in America and distant islands in the Pacific, it is incredible that no provision should have been made for them, and the question whether the Constitution should or should not extend to them have been definitely settled. If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to States, except in the territorial clause, which is absolute

in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. The States could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory they had none to delegate in that connection. The logical inference from this is, that if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions. If, upon the other hand, we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions.

There is a provision that "new States may be admitted by the Congress into this Union." These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new territories or the extension of the Constitution over them. The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. . . .

We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the Circuit Court is therefore

Affirmed.

Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, uniting in the judgment of affirmance.

Mr. Justice Brown, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise

concur. As, however, the reasons which cause me to do so are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me. . . .

First. The government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument. . . .

Second. Every function of the government being thus derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable.

Third. Hence it is that wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits. . . .

Sixth. As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the Constitution which is applicable to the territories is also controlling therein. . . .

Seventh. In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable. . . .

And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States. . . .

There is in reason then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. There can also be no controversy as to the right of Congress to locally govern the Island of Porto Rico

as its wisdom may decide, and in so doing to accord only such degree of representative government as may be determined on by that body. There can also be no contention as to the authority of Congress to levy such local taxes in Porto Rico as it may choose, even although the amount of the local burden so levied be manifold more onerous than is the duty with which this case is concerned. But as the duty in question was not a local tax, since it was levied in the United States on goods coming from Porto Rico, it follows that, if that island was a part of the United States, the duty was repugnant to the Constitution, since the authority to levy an impost duty conferred by the Constitution on Congress does not, as I have conceded, include the right to lay such a burden on goods coming from one to another part of the United States. And, besides, if Porto Rico was a part of the United States the exaction was repugnant to the uniformity clause.

The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation—for, whether the tax was local or national, it could have been imposed although Porto Rico had no representative local government and was not represented in Congress—but is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States? . . .

Let me come, however, to a consideration of the express powers which are conferred by the Constitution, to show how unwarranted is the principle of immediate incorporation, which is here so strenuously insisted on. In doing so it is conceded at once that the true rule of construction is not to consider one provision of the Constitution alone, but to contemplate all, and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies, and not by the letter which killeth.

Undoubtedly, the power to carry on war and to make treaties implies also the exercise of those incidents which ordinarily inhere in them. Indeed, in view of the rule of construction which I have just conceded—that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution—it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite thereof. If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. . . .

It is, then, as I think, indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken line of decisions of this court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions

against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfilment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.

Does, then, the treaty in question contain a provision for incorporation, or does it, on the contrary, stipulate that incorporation shall not take place from the mere effect of the treaty and until Congress has so determined? —is then the only question remaining for consideration. . . .

It is to me obvious that the above quoted provisions of the treaty do not stipulate for incorporation, but, on the contrary expressly provide that the "civil rights and political status of the native inhabitants of the territories hereby ceded" shall be determined by Congress. . . .

The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico. . . .

Mr. Chief Justice Fuller, (with whom concurred Mr.

Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham), dissenting. . . . It is also urged that Chief Justice Marshall was entirely in fault because while the grant was general and without limitation as to place, the words, "throughout the United States," imposed a limitation as to place so far as the rule of uniformity was concerned, namely, a limitation to the States as such. . . .

Taking the words in their natural meaning—in the sense in which they are frequently and commonly used—no reason is perceived for disagreeing with the Chief Justice in the view that they were used in this clause to designate the geographical unity known as "The United States," "our great republic, which is composed of States and territories."

Other parts of the Constitution furnish illustrations of the correctness of this view. Thus, the Constitution vests Congress with the power "to establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States."

This applies to the territories as well as the States, and has always been recognized in legislation as binding.

Aliens in the territories are made citizens of the United States and bankrupts residing in the territories are discharged from debts owing citizens of the States, pursuant to uniform rules and laws enacted by Congress in the exercise of this power. . . .

The inquiry is stated to be: "Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?" And the answer being given that it had not, it is held that the rule of uniformity was not applicable.

I submit that that is not the question in this case. The question is whether, when Congress has created a civil government for Porto Rico, has constituted its inhabitants a body politic, has given it a governor and other officers, a legislative assembly, and courts, with right of appeal to this court, Congress can, in the same act and in the exercise of the power conferred by the first clause of section eight, impose duties on the commerce between Porto Rico and the States and other territories

in contravention of the rule of uniformity qualifying the power. If this can be done, it is because the power of Congress over commerce between the States and any of the territories is not restricted by the Constitution. This was the position taken by the Attorney General, with a candor and ability that did him great credit.

But that position is rejected, and the contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions. . . .

Great stress is thrown upon the word "incorporation" as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States. Being such, and the act undertaking to impose duties by virtue of clause 1 of sec. 8, how is it that the rule which qualifies the power does not apply to its exercise in respect of commerce with that territory? The power can only be exercised as prescribed, and even if the rule of uniformity could be treated as a mere regulation of the granted power—a suggestion to which I do not assent—the validity of these duties comes up directly, and it is idle to discuss the distinction between a total want of power and a defective exercise of it.

The concurring opinion recognizes the fact that Congress, in dealing with the people of new territories or possessions, is bound to respect the fundamental guaranties of life, liberty, and property, but assumes that Congress is not bound, in those territories or possessions, to follow the rules of taxation prescribed by the Constitution. And yet the power to tax involves the power to destroy, and the levy of duties touches all our people in all places under the jurisdiction of the government.

The logical result is that Congress may prohibit commerce altogether between the States and territories, and

may prescribe one rule of taxation in one territory, and a different rule in another.

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and substitutes for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power.

In our judgment, so much of the Porto Rican act as authorized the imposition of these duties is invalid, and plaintiffs were entitled to recover. . . .

Mr. Justice Harlan, dissenting. . . .

In view of the adjudications of this court I cannot assent to the proposition, whether it be announced in express words or by implication, that the National Government is a government of or by the States in union, and that the prohibitions and limitations of the Constitution are addressed only to the States. . . .

Although from the foundation of the Government this court has held steadily to the view that the Government of the United States was one of enumerated powers, and that no one of its branches, nor all of its branches combined, could constitutionally exercise powers not granted, or which were not necessarily implied from those expressly granted, we are now informed that Congress possesses powers *outside of the Constitution*, and may deal with new territory acquired by treaty or conquest in the same manner *as other nations have been accustomed to act with respect to territories acquired by them.* In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our Government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this

Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. . . .

The idea prevails with some—indeed, it found expression in arguments at the bar—that we have in this country substantially or practically two national governments; one, to be maintained under the Constitution, with all its restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to exercise. It is one thing to give such a latitudinarian construction to the Constitution as will bring the exercise of power by Congress, upon a particular occasion or upon a particular subject, within its provisions. It is quite a different thing to say that Congress may, if it so elects, proceed outside of the Constitution. . . .

There is still another view taken of this case. Conceding that the National Government is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution, and that Congress has no power, except as given by that instrument either expressly or by necessary implication, it is yet said that a new territory, acquired by treaty or conquest, cannot become *incorporated* into the United States without the consent of Congress. What is meant by such incorporation we are not fully informed, nor are we instructed as to the precise mode in which it is to be accomplished. Of course, no territory can become a State in virtue of a treaty or without the consent of the legislative branch of the Government; for only Congress is given power by the Constitution to admit new States. But it is an entirely different question whether a domestic "territory of the United States," having an organized civil government established by Congress, is not, for all purposes of government by the Nation, under the complete jurisdiction of the United States, and therefore a part of, and incorporated into,

the United States, subject to all the authority which the National Government may exert over any territory or people. If Porto Rico, although a territory of the United States, may be treated as if it were not a part of the United States, then New Mexico and Arizona may be treated as not parts of the United States, and subject to such legislation as Congress may choose to enact without any reference to the restrictions imposed by the Constitution. The admission that no power can be exercised under and by authority of the United States except in accordance with the Constitution is of no practical value whatever to constitutional liberty, if, as soon as the admission is made—as quickly as the words expressing the thought can be uttered—the Constitution is so liberally interpreted as to produce the same results as those which flow from the theory that Congress may go outside of the Constitution in dealing with newly acquired territories, and give them the benefit of that instrument only when and as it shall direct. . . .

CHAPTER XLIII

OTHER INSULAR CASES

The following decisions show practical applications of the principle laid down in Downes *v.* Bidwell. The civil rights of the inhabitants of the Philippine Islands, an unincorporated territory, are not secured by the Constitution, but depend on such enactments as Congress may consider best suited for local conditions. Once a territory has been incorporated, and the provisions of the Constitution formally extended to it, as in the case of Hawaii, or where the benefit of these provisions is guaranteed by treaty of acquisition as in the case of Alaska, then the guarantees for procedural and substantive rights therein provided are at once effective.

134. *Hawaii* v. *Mankichi*[1]

This was a petition by Mankichi for a writ of *habeas corpus* to obtain his release from the Oahu convict prison, where he is confined upon conviction for manslaughter, in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict. . . .

Mr. Justice Brown delivered the opinion of the court.

The question involved in this case is an extremely simple one. The difficulty is in fixing upon the principles applicable to its solution. By a joint resolution adopted by Congress, July 7, 1898 (30 Stat. 750), known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its Constitution, the Hawaiian Islands and their dependencies were annexed "as a part of the Territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the*

[1] Supreme Court of the United States, 1903. 190 United States, 197.

United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." . . . . Under the conditions named in this resolution, the Hawaiian Islands remained under the name of the "Republic of Hawaii" until June 14, 1900, when they were formally incorporated by act of Congress under the name of the "Territory of Hawaii." (31 Stat. 141, chap. 339.) By this act the Constitution was formally extended to these islands (Sec. 5), and special provisions made for empanelling grand juries, and for unanimous verdicts of petty juries (Sec. 83).

The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately, and without new legislation, the common law proceedings by grand and petit jury, which had been held applicable to other organized Territories. . . .

By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice should be instantly changed, and the criminal procedure embodied in the Fifth and Sixth Amendments to the Constitution be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands resolution, adopting the municipal legislation of Hawaii, *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires Amendment 5, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury"; and, Amendment 6, that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." But

there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislative body? . . .

If the negative words of the resolution, "not contrary to the Constitution of the United States," be construed as imposing upon the islands every provision of a Constitution which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely, such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all powers of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making preparation. The legislature of the Republic had just adjourned, not to convene again until some time in 1900, and not actually convening until 1901. The resolution on its face bears evidence of having been intended merely for a temporary purpose, and to give time to the Republic to adapt itself to such form of territorial government as should afterwards be adopted in its organic act. . . .

It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly, they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of exist-

ing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation, remain in force after an annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being. . . .

The decree of the District Court for the Territory of Hawaii must be reversed, and the case remanded to that court, with instruction to dismiss the petition.

Mr. Justice White, with whom concurred Mr. Justice McKenna, agreed to the opinion of the majority on the ground "that as a consequence of the relation which the Hawaiian Islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the Fifth and Sixth Amendments of the Constitution concerning grand and petit juries were not applicable to that Territory, because, whilst the effect of the resolution of annexation was to acquire the islands, and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States and make them an integral part thereof. In other words, in my opinion, the case is controlled by the decision in Downes *v.* Bidwell, 182 U. S. 244."

Mr. Chief Justice Fuller with whom concurred Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham, dissented, stating his conclusion as follows:

"Assuming, solely for the sake of argument, that the mere fact of annexation might not in itself have at once extended to the inhabitants of Hawaii all the rights, privileges, and immunities guaranteed by the Constitution, and that Congress had the power to impose limitations in that regard, I think not only that Congress did not do so in the particulars in question, but that, in reenacting existing legislation, Congress, by the terms of the resolution, intentionally invalidated so much thereof as in these particulars was inconsistent with the Constitution. The presumptions are all opposed to any capitulation in the matter of common-law institutions."

Mr. Justice Harlan further dissented, stating his conclusions as follows:

"I am of opinion: 1. That when the annexation of Hawaii was completed, the Constitution—without any declaration to that effect by Congress, and without any power of Congress to prevent it—became the supreme law for that country, and, therefore, it forbade the trial and conviction of the accused for murder otherwise than upon a presentment or indictment of a grand jury, and by the unanimous verdict of a petit jury. 2. That if the legality of such trial and conviction is to be tested alone by the Joint Resolution of 1898, then the law is for the accused, because Congress, by that Resolution, abrogated or forbade the enforcement of any municipal law of Hawaii so far as it authorized a trial for an infamous crime otherwise than in the mode prescribed by the Constitution of the United States; and that any other construction of the Resolution is forbidden by its clear, unambiguous words, and is to make, not to interpret, the law."

135. *Rassmussen* v. *United States*[1]

Mr. Justice White delivered the opinion of the court. The plaintiff in error was indicted for violating sec.

[1] Supreme Court of the United States, 1905. 197 United States, 516.

127 of the Alaska Code, prohibiting the keeping of a disreputable house and punishing the offense by a fine or imprisonment in the county jail.

As stated in the bill of exceptions, when the case was called the court announced "that the cause would be tried before a jury composed of six jurors," in accordance with sec. 171 of the Code for Alaska adopted by Congress, wherein, among other things, it was provided as follows (31 Stat. at L. 358, chap. 786): "That hereafter in trials for misdemeanors six persons shall constitute a legal jury." . . .

At the threshold of the case lies the constitutional question whether Congress had power to deprive one accused in Alaska of a misdemeanor of trial by a common law jury, that is to say, whether the provision of the act of Congress in question was repugnant to the Sixth Amendment to the Constitution of the United States.

At the bar the Government did not deny that offenses of the character of the one here prosecuted could only be tried by a common-law jury, if the Sixth Amendment governed. The Government, moreover, did not dispute the obvious and fundamental truth that the Constitution of the United States is dominant where applicable. The validity of the provision in question is, therefore, sought to be sustained upon the proposition that the Sixth Amendment to the Constitution did not apply to Congress in legislating for Alaska. And this rests upon two contentions which we proceed separately to consider.

1. *Alaska was not incorporated into the United States, and therefore the Sixth Amendment did not control Congress in legislating for Alaska.* . . .

We are brought, then, to determine whether Alaska has been incorporated into the United States as a part thereof, or is simply held, as the Philippine Islands are held, under the sovereignty of the United States as a possession or dependency. . . .

The treaty concerning Alaska, instead of exhibiting, as did the treaty respecting the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, mani-

fested a contrary intention, since it is therein expressly declared, in Article 3, that:

"The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States; and shall be maintained and protected in the free enjoyment of their liberty, property and religion."

This declaration, although somewhat changed in phraseology, is the equivalent, as pointed out in Downes *v.* Bidwell, of the formula employed from the beginning to express the purpose to incorporate acquired territory into the United States, especially in the absence of other provisions showing an intention to the contrary. And it was doubtless this fact conjoined with the subsequent legislation of Congress which led to the following statement concerning Alaska made in the opinion of three, if not four, of the judges who concurred in the judgment of affirmance in Downes *v.* Bidwell.

"Without referring in detail to the acquisition from Russia of Alaska, it suffices to say that that treaty also contained provisions for incorporation, and was acted upon exactly in accord with the practical construction applied in the case of the acquisition from Mexico, as just stated.". . .

It follows, then, from the text of the treaty by which Alaska was acquired, from the action of Congress thereunder, and the reiterated decisions of this court, that the proposition that Alaska is not incorporated into and a part of the United States is devoid of merit, and therefore the doctrine settled as to unincorporated territory is inapposite and lends no support to the contention that Congress in legislating for Alaska had authority to violate the express commands of the Sixth Amendment.

This brings us to the second proposition, which is——

2. *That even if Alaska was incorporated into the United States, as it was not an organized territory, therefore the provisions of the Sixth Amendment were not controlling on Congress when legislating for Alaska.*

We do not stop to demonstrate from original considerations the unsoundness of this contention and its irrecon-

cilable conflict with the essential principles upon which our constitutional system of government rests. Nor do we think it is required to point out the inconsistency which would arise between various provisions of the Constitution if the proposition was admitted, or the extreme extension on the one hand, and the undue limitation on the other, of the powers of Congress which would be occasioned by conceding it. This is said, because, in our opinion, the unsoundness of the proposition is conclusively established by a long line of decisions. . . .

The argument by which the decisive force of the cases just cited is sought to be escaped is that, as when the cases were decided there was legislation of Congress extending the Constitution to the District of Columbia or to the particular territory to which a case may have related, therefore the decisions must be taken to have proceeded alone upon the statutes, and not upon the inherent application of the provisions of the Fifth, Sixth, and Seventh Amendments to the District of Columbia or to an incorporated Territory. And, upon the assumption that the cases are distinguishable from the present one upon the basis just stated, the argument proceeds to insist that the Sixth Amendment does not apply to the Territory of Alaska, because sec. 1891 of the Revised Statutes only extends the Constitution to the organized Territories, in which, it is urged, Alaska is not embraced.

Whilst the premise as to the existence of legislation declaring the extension of the Constitution to the Territories with which the cases were respectively concerned is well founded, the conclusion drawn from that fact is not justified. Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth, Sixth and Seventh Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution. . . .

As it conclusively results from the foregoing considerations that the Sixth Amendment to the Constitution was applicable to Alaska, and as of course, being applicable, it was controlling upon Congress in legislating for Alaska, it follows that the provision of the act of Congress under consideration, depriving persons accused of a misdemeanor in Alaska of a right to trial by a common law jury, was repugnant to the Constitution and void. . . .

136. *Balzac* v. *People of Porto Rico*[1]

Mr. Chief Justice Taft delivered the opinion of the court.

These are two prosecutions for criminal libel, brought against the same defendant, Jesus M. Balzac, on informations filed in the district court for Arecibo, Porto Rico, by the district attorney for that district. Balzac was the editor of a daily paper published in Arecibo, known as *El Baluarte*, and the articles upon which the charges of libel were based were published on April 16 and April 23, 1918, respectively. In each case the defendant demanded a jury. The Code of Criminal Procedure of Porto Rico grants a jury trial in cases of felony, but not in misdemeanors. The defendant, nevertheless, contended that he was entitled to a jury in such a case, under the Sixth Amendment to the Constitution, and that the language of the alleged libels was only fair comment, and their publication was protected by the First Amendment. His contentions were overruled; he was tried by the court, and was convicted in both cases and sentenced to five months' imprisonment in the district jail in the first, and to four months in the second, and to the payment of the costs in each. The defendant appealed to the Supreme Court of Porto Rico. That court affirmed both judgments. People *v.* Balzac, 28 P. R. R. 139; second case, 28 P. R. R. 141. . . .

The question before us, therefore, is: Has Congress, since the Foraker Act of April 12, 1900 (31 Stat. 77), enacted legislation incorporating Porto Rico into the

[1] Supreme Court of the United States, 1922. 258 United States, 298.

Union? Counsel for the plaintiff in error give, in their brief, an extended list of acts, to which we shall refer later, which they urge as indicating a purpose to make the island a part of the United States, but they chiefly rely on the Organic Act of Porto Rico of March 2, 1917 (39 Stat. 951 [Comp. St. sections 3803a–3803z]), known as the Jones Act.

The act is entitled "An act to provide a civil government for Porto Rico and for other purposes." It does not indicate by its title that it has a purpose to incorporate the island into the Union. It does not contain any clause which declares such purpose or effect. While this is not conclusive, it strongly tends to show that Congress did not have such an intention. Few questions have been the subject of such discussion and dispute in our country as the status of our territory acquired from Spain in 1899. The division between the political parties in respect to it, the diversity of the views of the members of this court in regard to its constitutional aspects, and the constant recurrence of the subject in the Houses of Congress, fixed the attention of all on the future relation of this acquired territory to the United States. Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference. Before the question became acute at the close of the Spanish War, the distinction between acquisition and incorporation was not regarded as important, or at least it was not fully understood and had not aroused great controversy. Before that, the purpose of Congress might well be a matter of mere inference from various legislative acts; but in these latter days, incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view.

Again, the second section of the act is called a "Bill of Rights," and included therein is substantially every one of the guaranties of the federal Constitution, except those relating to indictment by a grand jury in the case of infamous crimes and the right of trial by jury in civil and

criminal cases. If it was intended to incorporate Porto Rico into the Union by this act, which would *ex proprio vigore* make applicable the whole Bill of Rights of the Constitution to the island, why was it thought necessary to create for it a Bill of Rights and carefully exclude trial by jury? In the very forefront of the act is this substitute for incorporation and application of the Bill of Rights of the Constitution. This seems to us a conclusive argument against the contention of counsel for the plaintiff in error.

The section of the Jones Act which counsel press on us is section 5. This in effect declares that all persons who under the Foraker Act were made citizens of Porto Rico and certain other residents shall become citizens of the United States, unless they prefer not to become such, in which case they are to declare such preference within six months, and thereafter they lose certain political rights under the new government. In the same section the United States District Court is given power separately to naturalize individuals of some other classes of residents. . . . Unaffected by the considerations already suggested, perhaps the declaration of section 5 would furnish ground for an inference such as counsel for plaintiff in error contend, but under the circumstances we find it entirely consistent with non-incorporation. When Porto Ricans passed from under the government of Spain, they lost the protection of that government as subjects of the king of Spain, a title by which they had been known for centuries. They had a right to expect, in passing under the dominion of the United States, a status entitling them to the protection of their new sovereign. In theory and in law, they had it as citizens of Porto Rico, but it was an anomalous status, or seemed to be so in view of the fact that those who owed and rendered allegiance to the other great world powers were given the same designation and status as those living in their respective home countries so far as protection against foreign injustice went. It became a yearning of the Porto Ricans to be American citizens, therefore, and this act gave them the boon. What additional rights did it give them? It enabled them to move into the continental United States and becoming

residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political. A citizen of the Philippines must be naturalized before he can settle and vote in this country. Act of June 29, 1906, section 30, 34 Stat. 606 (Comp. St. section 4366). Not so the Porto Rican under the Organic Act of 1917.

In Porto Rico, however, the Porto Rican cannot insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him. The citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.

It is true that in the absence of other and countervailing evidence, a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union, as in the case of Louisiana and Alaska. This was one of the chief grounds upon which this court placed its conclusion that Alaska had been incorporated in the Union, in Rassmussen *v.* United States, 197 U. S. 516. But Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents, and one of them is in the very matter of trial by jury. This court refers to the difficulties in Dorr *v.* United States, 195 U. S. 138, 148.

"If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory, . . . was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and

in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. . . . Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition."

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse. Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system, which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when. Hence the care with which, from the time when Mr. McKinley wrote his historic letter to Mr. Root in April of 1900 (Public Laws Philippine Commission, 6–9—Act of July 2, 1902, 691, 692), concerning the character of government to be set up for the Philippines by the Philippine Commission, until the Act of 1917, giving a new Organic Act to Porto Rico, the United States has been liberal in granting to the islands acquired by the

Treaty of Paris most of the American constitutional guaranties, but has been sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it. We cannot find any intention to depart from this policy in making Porto Ricans American citizens, explained as this is by the desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper, and there without naturalization to enjoy all political and other rights.

We need not dwell on another consideration which requires us not lightly to infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people. Incorporation has always been a step, and an important one, leading to statehood. Without, in the slightest degree, intimating an opinion as to the wisdom of such a policy, for that is not our province, it is reasonable to assume that, when such a step is taken, it will be begun and taken by Congress deliberately, and with a clear declaration of purpose, and not left a matter of mere inference or construction.

Counsel for the plaintiff in error also rely on the organization of a United States District Court in Porto Rico, on the allowance of review of the Porto Rican Supreme Court in cases when the Constitution of the United States is involved, on the statutory permission that Porto Rican youth can attend West Point and Annapolis Academies, on the authorized sale of United States stamps in the island, on the extension of revenue, navigation, immigration, national banking, bankruptcy, federal employers' liability, safety appliance, extradition, and census laws in one way or another to Porto Rico. With the background of the considerations already stated, none of these, nor all of them put together, furnish ground for the conclusion pressed on us.

The United States District Court is not a true United

States court established under article 3 of the Constitution to administer the judicial power of the United States therein conveyed. It is created by virtue of the sovereign congressional faculty, granted under article 4, section 3, of that instrument, of making all needful rules and regulations respecting the territory belonging to the United States. The resemblance of its jurisdiction to that of true United States courts, in offering an opportunity to non-residents of resorting to a tribunal not subject to local influence, does not change its character as a mere territorial court. Nor does the legislative recognition that federal constitutional questions may arise in litigation in Porto Rico have any weight in this discussion. The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. This has not only been admitted, but emphasized, by this court in all its authoritative expressions upon the issues arising in the Insular Cases, especially in the Downes *v.* Bidwell and the Dorr Cases. The Constitution, however, contains grants of power, and limitations which in the nature of things are not always and everywhere applicable and the real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which ones of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements. The guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, and, as this guaranty is one of the must fruitful in causing litigation in our own country, provision was naturally made for similar controversy in Porto Rico. Indeed, provision is made for the consideration of constitutional questions coming on appeal and writs of error from the Supreme Court of the Philippines, which are certainly not incorporated in the Union. Judicial Code, section 248 (Comp. St. 1225a).

On the whole, therefore, we find no features in the Organic Act of Porto Rico of 1917 from which we can infer the purpose of Congress to incorporate Porto Rico into the United States with the consequences which would follow. . . .

The judgments of the Supreme Court of Porto Rico are *Affirmed.*

INDEX

Adkins *et al. v.* Children's Hospital, 357–368.
Administrative decisions, Herbert Hoover on, 240; on citizenship, 246.
Alaska, annexation of, 496; constitutional status of, 496; incorporation of, 497; legal status of jury trial in, 496.
Aliens, administrative decisions affecting, 244; treaty rights of, 264.
Arizona, recall from office in, 453–455.
Arthur, President, first annual message of, 208–210.
Australian ballot, introduction of, in Massachusetts, 456–460; law, 460 ff.

Bailey *v.* Drexel Furniture Co., 182–185.
Balzac *v.* People of Porto Rico, 499–506.
Barbier *v.* Connolly, 48–51.
Bills of Rights, functions of, 32.
Boycott in industrial disputes, 327; secondary, 333.
British Parliament, financial procedure in, 295.
Bryce, James, on municipal government, 425; on party functions, 456; on the indirect method of electing Federal Senators, 272–273.
Budget and Accounting Act, digest of, 297–300.
Budgetary Reforms of 1921, 301–303.
Bunting *v.* Oregon, 351–356.

California school law, 262.
Caucus, in Congress, 284; in State legislatures, 278.
Champion *v.* Ames, 162–167.
Chicago, Burlington and Quincy Railroad *v.* Iowa, 47.
Chicago, Milwaukee and St. Paul Railroad *v.* Minnesota, 90–94.
Child labor, 173; Amendment, 185; cannot be regulated under taxing power, 182; exclusively under State control, 182 *ff.*; tax law, 182.
Children's Bureau, 202.
China, Treaty of 1909 with allied powers, 256.
Chinese, citizenship of, 1 ff., 248; Exclusion Acts, 2, 6, 246; segregation of, in San Francisco schools, 263; State discrimination against, prohibited, 37; treaty rights of, 36.
Citizenship, administrative decisions on, 246.
City Council, powers and functions of under Massachusetts Optional Charter Act, 427 ff.
City Manager under Massachusetts Optional Charter Act, 436 ff.
Civil Rights Cases, 20–28.
Civil Service Act, 1883, 233–237.
Civil Service reform, 229–233.
Class legislation, 51; prohibited by Fourteenth Amendment, 27.
Clayton Act, 324–325; judicial interpretation of, 325; limitations on use of injunction under, 329; relation to Sherman Anti-Trust Act, 328 ff.
Cleveland, President, and Chicago strike, 308; on suspensions and removals, 1886, 221–226.
"Closed" primary, 464.
Coke, Lord, quoted on due process of law, 31.
Collector *v.* Day, 158–159.
Colonial administration, 476.
Colorado, eight-hour law for mines and smelters in, 371.
Colorado Constitution, eight-hour law incorporated in, 373.
Colorado Supreme Court, strict construction on State police power by, 371 ff.
Commerce, Act to regulate, 1887, 56–57; does not include manufacturing, 124, 178; Federal regulation of, 52 ff.
Commerce Court, 78.
Commission form of municipal government under Massachusetts Optional Charter Act, 431 ff.
Commissioners of Laramie County *v.* Commissioners of Albany County, 415–417.
Common Law, English citizenship under, 4 ff.; importance of jury system under, 503; police power under, 42 ff.; restraint of trade under, 132 ff.; status of women under, 470.
Comptroller General, functions of, 300.
Compulsory education bill in Oregon, 449 ff.
Congress, authorization of executive agreements by, 256; caucus in, 284; constitutional limitations on power of, 478; critics of, 292–294; diversity of business in, 292; effect of spoils system on, 231; financial procedure in, prior to Act of 1921, 296–297; not impowered to regulate manufacturing, 178; paramount power over commerce, 85 ff., 109, 117, 142; power of, to legislate for Alaska, 496 ff.; powers of, in relation to Territories, 480 ff.; powers under Fourteenth Amendment, 21 ff.; propaganda to influence legislation in, 293; reform of financial procedure in 1921, 302; taxing power of, 170.

Constitution, Federal, applicability of, to acquisitions of 1898, 477 ff.; to Hawaii, 492; to Porto Rico, 505; to the Philippines, 505; guarantee of republican form of government under, 447; interpretation of revenue clauses of, 479; limitations on treaty-making under, 269 ff.; provision on presidential succession, 209; provision on treaty-making, 261; provisions on citizenship, 3; treaty-making power, "strict constructionist" interpretation of, 268.
Contempt of court, power of courts to punish for, 313.
Contracts, State power to regulate, 336 ff.
Convention system, overthrow of, 463.
Cooley, Judge, on due process of law, 243.
Corporations legal persons, 48.
Courts of equity, and injunction, 317.

Danbury Hatters Case, 322.
Dawes Act, 8.
Dayton-Goose Creek Railroad *v.* United States, 110–118.
Debs Case, 308–314.
Direct primaries in Oregon, 282.
Direct primary, 463 ff.
Direct taxes, 153 ff.
Discrimination in inter- and intrastate rates, 88; under Act of 1920, 103.
District of Columbia, minimum wage law in, 357.
Downes *v.* Bidwell, 477–490.
Due process of law, 29; and administrative determination, 242 ff.; Lord Coke quoted on, 31; rate-making commissions subject to, 92.
Duplex Printing Press Co. *v.* Deering *et al.*, 325–334.

Edmunds, Senator, of Vermont, on election of Senators, 279–281.
Eighteenth Amendment, text of, 196 ff.
Electoral Commission, 208.
Electoral Count Act, 211–215.
English citizenship under common law, 4 ff.
Equal protection of the laws, 29.
Evans *v.* Gore, 159–161.
Ex parte Holmes, 397.
Executive agreements, 252–260.

Federal subsidies, State-rights protest against, 205–207.
Field *v.* People, 398–402.
Fifteenth Amendment, 3–4; suffrage under, 14.
Fifth Amendment, grand jury indictment under, 32; limitation of Federal power, 41; minimum wage law in District of Columbia a violation of, 364; relation to taxing power, 171 ff.
Foraker Act, 501.
Fourteenth Amendment, 5; applicability to railroad rate regulation, 99 ff.; citizenship under, 3, 247, 478; citizenship of women under, 11 ff.; class legislation prohibited by, 27; due process of law under, 29 ff.; equal protection of law under, 29; liberty of contract under, 236 ff.; powers of Congress under, 21 ff.; prohibition on race discrimination, 16; protection of aliens under, 36 ff.; relation of suffrage to, 11 ff.; restraint on State legislation under, 21 ff.; State police power subject to, 40, 337.
Fraud orders, 241 ff.

"Government by injunction," 314–321.
Governor, functions of, in Maryland budget system, 303 ff.; inadequate administrative powers of, 392; inadequate removal power of, 411; no inherent powers in office of, 397 ff.; veto power of, 395.
Grand jury indictment, 30 ff.

Hammer *v.* Dagenhart, 176–182.
Harrison Narcotic Drug Act of 1914, 174 ff.
Hawaii *v.* Mankichi, 491–495.
Hawaiian Islands, annexation of, 491; constitutional status of, 491 ff.
Hepburn Act of 1906, 65–69.
Highway construction, 206.
Hoover, Herbert, on administrative decisions, 240.
House of Representatives, Judiciary Committee of, on treaty-making power, 270–271; limitations on debate in, 292; procedure on revenue bills, 288 ff.
Hurtado *v.* People of California, 29–33.

Illinois, narrow scope of executive power under constitution of, 398 ff.
Immigration, administrative decisions in connection with, 243–248.
In re Morgan, 371–373.
Income tax, 150; amendment authorizing, 1913, 158; constitutionality upheld, 1880, 151 ff.; declared unconstitutional, 1895, 153 ff.; not applicable to new or excepted subjects, 161.
Incorporation of territories, 504.
Indians, citizenship of, 1, 9; legal status of, 1, 8–11; segregation of, in San Francisco schools, 263; treaties with, 258.
Initiative and referendum, 440 ff.; in Oregon: the law of 1907, 442–445; in practice, 449–453.
Injunction, definition of, 308; in Debs Case, 315 ff.; limitations on use of, in Clayton Act, 324, 329; use of the, in America, 322–324.
Inter- and intrastate rates, discrimination in, 88.
Interstate Commerce Act, 1887, abstract of, 56–57; amended, 1906, 65; amended 1910, 76; Elkins amendments to, 63–65; relation to Sherman Anti-Trust Act, 130.

Interstate Commerce Commission, authorized to suspend rate changes, 76; creation of, 57; enlargement of, 66; enlargement of power, 1920, 103; judicial review of orders of, 68; no power to prescribe rates, 57; power to prescribe uniform accounting, 68; rate-making power conferred on, 66;
Interstate Commerce Commission *v.* Illinois Central Railroad, 69–75.
Interstate railroad rates, 63, 76.
Intrastate fares, status under Act of 1920, 103 ff.
Intrastate railroad rates, State control of, 52; relation of national railway system to, 106 ff.

Japan, treaty of 1894 with, 263.
Japanese, segregation of, in San Francisco schools, 263.
Japanese Immigrant Case, 248.
Judicial review of rates, 90.
Juries, State control of, 17.
Jury system, importance under common law, 503.
Jury trial, legal status of, in Hawaii, 492.

Kadderly *et al. v.* City of Portland *et al.*, 447.

Leisy *v.* Hardin, 186–191.
Liberty of contract, limitations on, 359, 366; State police powers and, 336 ff.; violated by New York labor law, 374.
Lochner *v.* New York, 335–345.
"Log-rolling," 291.
Lottery traffic, 163.
Lowden, Hon. Frank O., on growth of State functions, 403.

McCall, Samuel W., on power of Senate, 285.
McCray *v.* United States, 167–174.
Magna Charta, "due process of law" under, 30 ff.
Mann-Elkins Amendment to the Interstate Commerce Act, 76–78.
Maryland budget system, 303–307.
Massachusetts, administrative decentralization in, 409–411; introduction of Australian ballot in, 456–460.
Massachusetts Bill of Rights, quoted, 240.
Massachusetts Optional Charter Act, 425–439.
Maximum Freight Rate Case, 57–62.
Mayor, powers and functions of, under Massachusetts Optional Charter Act, 427 ff.
Michigan, constitutional provision on executive in, 392–396.
Minnesota Rate Cases, 78–83.
Minor *v.* Happersett, 11–15.
Mondell, Hon. Frank W., on Congress, 292.
Muller *v.* Oregon, 346–351.
Municipal crisis of 1902 in Ohio, 418–422.
Municipal government, improvement in, since 1900, 425; James Bryce on, 425; under Ohio Constitution of 1912, 422–424.
Munn *v.* Illinois, 40–47.

Negro, civil rights of, 20 ff.
New York, administrative decentralization in, 412; legislative appointment in, 386; regulation of hours of labor of minors and women in, 373.
New York Constitutional Convention, 1894, address on woman suffrage, 467–475.
Newlands resolution, 491.
Nineteenth Amendment, text of, 473.
Nominating methods, 463–466.
Nominations, reform of, 456 ff.; under Massachusetts law of 1889, 457.
Northern Securities Co. *v.* United States, 140–145.

Ohio, classification of cities in, 418 ff.; Constitution of, 1851, status of municipalities under, 417; Constitution of, 1912, status of municipalities under, 422–424.
Oleomargarine, power of Congress to tax, 168 ff.
"Open" primary, 464.
Oregon, direct primaries in, 282; statute regulating hours of work for women, 346; ten-hour law of, 351; Senatorial elections in, 281–283.
Original Package Doctrine, 187.

Party, legal regulation of, 461 ff.; rules for membership in, 465.
Party functions, James Bryce on, 456.
Peik *v.* Chicago and Northwestern Railway, 47–48.
Pembina Mining Co. *v.* Pennsylvania, 48.
People *ex rel* Carter *v.* Rice, 385–388.
People *v.* Schweinler Press, 376–379.
People *v.* Williams, 373–376.
Philippine Islands, constitutional status of, 496 ff.
Police power, definition of, 39; Federal, 162; scope of State, 39 ff.; under common law, 42 ff.
Pollock *v.* Farmers' Loan and Trust Co., 153–158.
Porto Rico, citizenship of inhabitants of, 501; constitutional status of, 477; judicial system of, 504; not an incorporated territory, 506; Organic Act, 1917, 500; status under Organic Act, 1917, 500.
President, administrative powers of, 392, 402; budgetary powers of, 298 ff.; 301 ff.; relations with Congress, 293.
Presidential electoral system, 215–218.
Presidential succession, 210–211.
Primary elections, regulation of, 460–463.
"Privileges or immunities," interpretation of, 11 ff.

Public Clearing-House *v.* Coyne, 241–243.
Public interest, effect on property rights, 42 ff.
Putnam-Jacobi, Mary, address on woman suffrage, 467–473.

Railroad companies, affected by public interest, 47; entitled to fair returns on investment, 100, 111.
Railroad commissions, forbidden to impose confiscatory rates, 94; must observe due process of law, 90.
Rassmussen *v.* United States, 495–499.
Rayner, Senator, on President Roosevelt and Santo Domingo, 250–252; on the treaty-making power, 268–270.
Reagan *v.* Farmers' Loan and Trust Co., 94–98.
Recall from office in Arizona, 453–455.
Recapture provisions under Transportation Act of 1920, 110.
Removal power of Governor, 411.
Removals and suspensions, President Cleveland on, 221–226.
Restraint of trade, 132 ff.
Rhodes *v.* Iowa, 192–195.
Roosevelt, President, Senator Rayner on President Roosevelt and Santo Domingo, 250–252.
Root, Elihu, on representative government, 440; on San Francisco school controversy, 473–475; on State constitutions, 380; on woman suffrage, 473–475.
"Rule of reason," 149.

San Francisco school controversy, 261–268.
Santo Domingo, Senator Rayner on President Roosevelt and Santo Domingo, 250–252.
Senate, attitude on executive agreements, 251 ff.; courtesy of, 237–238; encroachment on taxing power, 287 ff.; filibustering in, 285; lack of limitations on debate in, 292; power of, 285–289; power to amend treaties, 259; powers in suspensions and removals, 221 ff.; procedure in financial measures, 289–292.
Senatorial deadlocks, 276–277.
Senators, United States, Act of 1866 regulating elections of, 273–274.
Seventeenth Amendment, text of, 283.
Shaw, Chief Justice, on grand jury, 30; on police power, 39.
Sheppard-Towner Act, 201–204.
Sherman Anti-Trust Act, 120–122; applicability to railroads, 128 ff.
Shreveport Rate Case, 83–90.
Shurtleff *v.* United States, 226–228.
Silver Purchase Law, 287.
Sixteenth Amendment, text of, 158 ff.
Sixth Amendment, applicability of, to Alaska, 496.
Slavery, 25 ff.
Smyth *v.* Ames, 98–102.
Spoils system, 230.
Springer *v.* United States, 150–153.
Standard Oil Co. *v.* United States, 145–149.
State, administration, defects of, 403; boards and commissions, 404–409; cannot interfere with interstate commerce, 187 ff.; control of manufacturing, 179; control of suffrage, 13; discrimination against Negro, 16 ff.; discriminatory laws prohibited, 27; instrumentalities exempt from Federal taxes, 159 ff.; laws must not violate treaties, 266; manufacturing under control of, 125 ff.; may not obstruct interstate commerce, 310; may regulate railroad charges, 47; must observe due process of law, 21 ff.; power to regulate contracts, 336 ff.; rights and treaties, 264.
State *ex rel* Attorney-General *v.* Cunningham, 388–391.
State *ex rel* Knisely *et al. v.* Jones *et al*,. 418.
State constitutions, determine status of municipal corporations, 416; enlargement of, 369; limitations on government power in, 370; restrictions on local and special legislation under, 415.
State Executive Department, 392–396.
State Executive, power of, 396–397.
State Legislatures, caucus in, 278; effects of Senatorial elections on, 275–276; election of United States Senators by, 273 ff.; limitations upon, 380.
State police power, and liberty of contract, 336 ff.; and protection of women employees, 375 ff.; Congress cannot require exercise of, 179 ff.; regulation of hours of labor under, 353 ff.; strict construction of, by Colorado Supreme Court, 371 ff.
State-rights protest against Federal subsidies, 205–207.
State *v.* Covington, 385.
States, budgetary reform in, 295; control of intrastate railroad rates by, 79 ff.; debarred from treaty-making, 264; effect of equal representation of, in Senate, 286 ff.
Strauder *v.* West Virginia, 15–19.
Subsidy system, growth of the, 197–200.
Suffrage, constitutional status of, 12.

Taft, President, on appointments to office, 238.
Tenth Amendment, conflict of treaties with, 268.
Tenure of Office Act, 219–220; amendment to, 1869, 220–221.
Territories, incorporated, 476 ff.; of United States, constitutional status of, 482 ff.
Thirteenth Amendment, effect of, 25 ff.; interpretation of, in Insular Cases, 478.
Transportation Act of 1920, 102 ff.
Treaties, territorial cessions under, 484.
Treaty agreements, 252–260.

Trial by jury, legal status of, in Porto Rico, 500 ff.
Trust, definition of, 119–120.
Trusts, Federal regulation of, 119.
Turpie, Senator, of Indiana, speech on election of Senators, 277–278.

Unclassified service, appointments in the, 238–239.
United States *v.* Doremus, 174–176; United States *v.* E. C. Knight Co., 122–127; United States *v.* Ju Toy, 248–249; United States *v.* Trans-Missouri Freight Association, 128–139; United States *v.* Wong Kim Ark, 1–8.

Veto power of Governor, 395.
Virginia Constitution, limitations on legislature under, 380 ff.

Wabash, St. Louis and Pacific Railway Co. *v.* Illinois, 52–56.
Webb-Kenyon Act, 195–196.
Webster, Daniel, definition of law, 34.
Wilson, Woodrow, relations with Congress, 293.
Wilson Act, 191–192.
Wisconsin, constitutional provisions on legislative apportionment in, 388.
Wisconsin Passenger Fares Case, 102–110.
Woman suffrage, address by Elihu Root, 473–475; address on, by Mary Putnam-Jacobi, 467–473.
Women, denial of political equality to, 471; economic independence of, 468; entitled to special legal protection, 349; legal status of, 467; minimum wage laws for, 357 ff.; night work in factories prohibited by New York, 376; Oregon statute regulating hours of work for, 346; regulation of hours of labor of minors and women in New York, 373; status of, under common law, 470.

Yick Wo *v.* Hopkins, 35–38.

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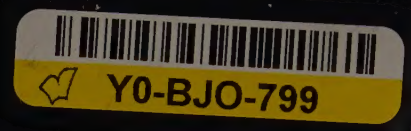
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